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IN THE

Supreme Court of the United States

PATRICE PHILSON, a/k/a JUSTICE ALLAH,

Petitioner,

v.

JAMES BARBO, Administrator, Northern States Prison; and THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED BY THIS APPEAL

1. Was the Third Circuit Court of Appeals' denial of petitioner's habeas corpus relief petition based on an unreasonable application of clearly established federal law as determined by the United States Supreme Court?

2. Was the Third Circuit Court of Appeals' denial of petitioner's claims for habeas corpus relief in light of the state's introduction of knowingly perjured testimony, based on an unreasonable application of clearly established federal law as determined by the United States Supreme Court?

3. Was the Third Circuit Court of Appeals' denial of petitioner's claims of ineffective assistance of counsel based on an unreasonable application of clearly established federal law as determined by the United States Supreme Court?

4. Did the Third Circuit Court of Appeals correctly apply the United States Supreme Court standards in light of this Court's recent findings in the matter of *Wiggins v. Smith*, 123 S. Ct. 2527?

5. Did the district court commit an abuse of discretion by rendering a decision that was never reported by the record in violation of any clearly established federal law as determined by the United States Supreme Court?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the United States District Court for the District of New Jersey denying the petition for a writ of habeas corpus is unpublished and appended at Pet.App. 26a. The Opinion of the United States District Court for the District of New Jersey denying the petitioner's motion for reconsideration is unpublished and appended at Pet.App. 12a. The Opinion of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court is unpublished and appended at Pet.App. 1a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered its opinion on October 9, 2003. An Order denying rehearing was entered on November 24, 2003. On February 19, 2004, this Court entered an Order granting petitioner an extension of time to file a petition for a writ of certiorari to and including April 22, 2004. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1241(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

> confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

On February 1, 1990, at approximately 2 a.m., Eric Ford was killed in the area of 6th Avenue and 13th Street in Newark, New Jersey. The State's theory of the case was that the petitioner was robbing Ford and shot him after an argument occurred. To establish its case, the state relied on the testimony of four witnesses: Aisha Jones, Erica Dawson, Damien "Naps" Wise, and Glenn Copeland. Aisha Jones and Erica Dawson had accompanied Ford to that intersection because Ford told Erica Dawson and Aisha Jones that he had to collect some money. Petitioner was alleged to originally have worn a brown 49ers jacket; Wise was alleged to have worn a green Jets jacket and hat. According to Jones, she observed petitioner and Wise walk into a vacant lot and switch coats. Wise and Erica Dawson testified that there was no switching of coats before the incident. The green Jets jacket and hat were recovered by police 6 days after the murder at the home of Damien "Naps" Wise. The jacket

was introduced into evidence by the state, and identified by Wise and Aisha Jones in court. Damien "Naps" Wise identified the green Jets jacket as *his coat*, and indicated that at the time of the shooting, he was wearing the green Jets jacket and hat.

Erica Dawson's testimony wavered during the trial. Despite the fact that she claimed in her police statement that there was no doubt in her mind that petitioner shot Ford and that petitioner was wearing a short brown 49ers jacket and pulled the gun out the pocket of the 49ers jacket, at one point during trial, Erica Dawson admitted that she didn't recall what the petitioner was wearing or where he pulled the gun from. Only after skillful guidance by the prosecutor was Erica Dawson allowed to stumble back to her original testimony that petitioner was wearing a short 49ers jacket.

By far, the State's most powerful testimony came from its chief witness, Damien "Naps" Wise. Wise testified that shortly after the shooting, petitioner ran to the home of Lorretta Barber (a/k/a Stinky), Carolyn Moore (a/k/a Tootsie) and Linda Barber.[1] Wise claimed that, when he entered the second floor bedroom, he observed petitioner ***hiding*** behind a curtain. Wise testified that petitioner asked him was the victim dead yet! According to Wise, when he informed petitioner that the victim was lying on the ground gurgling on his own blood, Petitioner started laughing! A short time after Wise gave this chilling testimony, Detective William Thomas of the Newark Police Department, and Investigator Roger Spain of the Essex County Prosecutors Office, interviewed the Barber family in an apparent attempt to corroborate Wise's testimony. According to both investigators, the Barber family was questioned about the testimony provided

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1. Lorretta Barber, Linda Barber, and Carolyn Moore are all family members. Lorretta and Carolyn are sisters, and Linda is their mother. Hereafter they will be referred to as simply the Barber family. Lorretta's a/k/a is Stinky and Carolyn's a/k/a is Tootsie.

by Wise, and was told that the petitioner was never inside the Barber home on the night in question. Carolyn Moore did indicate that petitioner had stopped by the house, but due to the hour of night, she wouldn't allow him to come inside. On the petitioner's post conviction relief appeal, petitioner's attorney, Mr. Edward A. Jerejian, Esq. conducted an independent investigation into the Barber family. As a result of counsel's investigation, Mr. Jerejian interviewed Loretta Barber at his West Caldwell, New Jersey office and discovered that, not only was petitioner never inside the Barber home on the night in question, but neither was Wise. Counsel secured an affidavit from Lorretta Barber at his office.

As part of petitioner's appeal for post conviction relief, petitioner included an affidavit by Cawana Dawson. [Cawana Dawson is the elder sister of the State's witness, Erica Dawson.] Cawana Dawson indicated in her affidavit that on the night of the shooting, her sister, Erica Dawson, and her sister's friend Aisha Jones arrived at her home in Irvington, New Jersey. According to Cawana Dawson, she was informed by Erica Dawson and Aisha Jones that their friend Eric Ford was just shot and killed and they had no idea why he was shot.

Cawana Dawson's affidavit indicates that, because she was familiar with the area of the shooting, and had known many people from that neighborhood, she asked both witnesses had they known who shot their friend. According to Cawana Dawson, Erica Dawson and Aisha Jones advised her that they had no idea who had shot their friend. Cawana Dawson further indicated that, days after the shooting, Erica Dawson and Aisha Jones encountered Damien "Naps" Wise at a dance club called "Sensation" in downtown Newark. According to Cawana, Wise informed them that the petitioner had some "girls" out looking for them. Both witnesses then testified that Wise instructed his friends to, "Get Them!" (Meaning to hurt or harm them.) Cawana Dawson stated that after the encounter with Wise, she was told

by Erica Dawson and Aisha Jones, that Wise at one point, indicated to them that the petitioner shot the victim. Cawana Dawson between February 1, 1990, and February 7, 1990, provided Erica Dawson and Aisha Jones with physical descriptions of petitioner.

On August 24, 2000, in a 14 page decision, The Honorable William H. Walls, U.S.D.J., granted petitioner an evidentiary hearing as to petitioner's claims that trial counsel had rendered ineffective assistance of counsel by not calling certain witnesses. (App. F) The witnesses that petitioner asked counsel to call were Cawana Dawson, Quitina Holden, Nickey Morgan, Michael Faison, and the entire Barber Family. The district court's order was very specific.

The court order stated that an evidentiary hearing is to be conducted *solely* as to trial counsel's strategy and rationale for his action. (App. F) The hearing was conducted on October 5, 2000. When questioned as to why he didn't call Cawana Dawson as a witness in this case, counsel indicated that the petitioner never informed him of Cawana Dawson. As to the Barber family, counsel claimed that the petitioner did ask him to call the Barber family as witnesses, but only as "alibi defense" witnesses. Counsel claimed that had he called the Barber family as alibi defense witnesses, they would have basically destroyed petitioner's claim that he was never there. Counsel further added that had he called the Barber family and they testified that petitioner tried to enter the home and was refused entry, this testimony would have been hurtful. However counsel admitted under cross examination that he never interviewed a single witness in this case, never conducted his own pre-trial investigation, and never even contemplated hiring an investigator to assist him. The district court accepted counsel's reasoning as trial strategy, and denied petitioner's habeas corpus relief. Petitioner filed a *Pro Se* motion for reconsideration based on claims that counsel committed perjury at the evidentiary

hearing by claiming he was unaware of Cawana Dawson, and that petitioner wanted the Barber family called as alibi witnesses. The motion was denied. (App. D, 23a)

REASONS FOR GRANTING THE PETITION

The actions by counsel in this case are suspect at best. John Vantuno, Esq. (trial counsel) testified at an October 5, 2000 evidentiary hearing before the Honorable William H. Walls, U.S.D.J., that he never interviewed a single witness in this case, never even contemplated hiring an investigator to assist him, and admitted to doing no investigation. Counsel's admission is troublesome. In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme court found that under the Sixth Amendment counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. (*Id.* at 691) To assist this court in determining the merits of this case, a brief analysis is appropriate. During the October 5, 2000 evidentiary hearing before the district court, trial counsel was asked if the petitioner had ever provided him with the names of Cawana Dawson and the Barber family. Counsel insisted that he never heard of Cawana Dawson, and that petitioner wanted the Barber family called as alibi witnesses only. What must be pointed out first and foremost to the court is that counsel's claims that petitioner wanted the Barber family called as alibi defense witnesses, is nothing more than an excuse by trial counsel to justify his own faulty actions. Counsel's own remarks during the trial, and summation are very telling.

First counsel argues that a manslaughter charge should be given because according to a witness he spoke to, the victim hit the gun making it go off. Then counsel turns around and tells the jury that he is not even sure if the Barber family actually really existed. A charge of manslaughter because the victim hit the gun, is not the words or thoughts of an attorney who is out

to prove his client was never at the scene. [ala: an alibi defense] The district court issued a writ in this matter to have counsel testify as to his strategic decisions and the rationale for making those decisions. Counsel insisted that his strategy was "Alibi." This claim by counsel fails utterly and causes one to question whether or not counsel had *any* strategy at all. Petitioner states unequivocally, that he never asked counsel to call the Barber family as "alibi defense" witnesses. Moreover, counsel's own admission undermines his very strategy for defense. The admission by counsel that he spoke to a witness who told him that the victim hit the gun making it go off, clearly places the petitioner at the scene, and undermines counsel's claims of "alibi" by petitioner. To further add to this undermining of his claim of an alibi as a defense strategy, counsel then argued to the jury, that the very witnesses that he claimed petitioner wanted called as alibi defense witnesses, he didn't even know if they really existed!

If counsel is claiming an alibi defense, then argues for a lesser included charge that places petitioner at the scene, then tells the jury that the very witnesses that he claims petitioner wanted called to support his alibi defense probably don't even exist, then exactly what was counsel's trial strategy? If alibi was counsel's defense, then counsel pulverized that defense by indicating that he didn't even know if the alibi witnesses actually existed. It should be noted that counsel's very testimony that he spoke to a witness who told him that the victim hit the gun making it go off, calls into question counsel's credibility in this matter. At the October 5, 2000 hearing, counsel advised the district court that he never spoke to a single witness in this case, never conducted any sort of investigation and never even contemplated hiring an investigator to assist him.

Based on counsel's testimony, the petitioner should have been allowed, at the very minimum, a new evidentiary hearing before the district court to ascertain counsel's strategy, and confront counsel with his perjured testimony at the evidentiary

hearing. If the reasoning given by trial counsel at the evidentiary hearing is actually based on perjury, then the United States Supreme Court's landmark decision of *Strickland v. Washington*, 466 U.S. 668 (1984) offers no protection to counsel under the "reasonable decision" aspect, if counsel's reasoning and rationale for his decision was actually based on perjury.

It should be noted that, although the district court denied petitioner's request for a new evidentiary hearing, the court did note in its denial of reconsideration that: "In opposing the reconsideration motion, Respondent's, State of New Jersey, does not attack any of Petitioner's factual allegations, but rather argues that Petitioner has not met the Reconsideration Standard under Local Civil Rule 7.1(g)" Based on the fact that the record fully supported petitioner's claims of perjury by counsel at the evidentiary hearing, and the decision by the district court, and subsequent rulinxg by Third Circuit Courts of Appeals, denied petitioner the Constitutional right to effectively cross examine counsel, and expose trial counsel's motivation in testifying, the lower court's decisions to deny petitioner habeas corpus relief was based on an unreasonable application of clearly established federal law as determined by the Supreme Court Of the United States. *Davis v. Alaska*, 415 U.S. 308 (1974). The Third Circuit's ruling on October 9, 2003 was based on an unreasonable application of clearly established federal law, and petitioner prays that this court issue a writ of certiorari to review the lower courts action in this matter.

I. The Third Circuit Court Of Appeals' Denial Of Petitioner's Claims For Habeas Corpus Relief In Light Of The State's Introduction Of Knowingly Perjured Testimony Was Based On An Unreasonable Application Of Clearly Established Federal Law As Determined By The United States Supreme Court.

The testimony by Damien "Naps" Wise that petitioner was seen hiding inside the Barber's residence, asked questions about the murder, then allegedly started laughing when told the victim was laying on the ground gurgling on his own blood, was extremely powerful testimony! In fact, this testimony was so chilling, that during petitioner's evidentiary hearing, the district court judge told counsel to stop mentioning it. The State's very own investigators supplied the prosecutor with overwhelming evidence to demonstrate that Wise's testimony was perjured, and the State still introduced this testimony. In reviewing the issues surrounding this case, The Third Circuit Court of Appeals found that:

> As a matter of trial strategy, Vantuno decided not to call these witnesses because their testimony would have supplied evidence of Philson's flight. Giving appropriate deference to counsel's judgment in light of all the circumstances here, we cannot say he was ineffective in his strategic decision. Moreover, as the district judge pointed out, the testimony of these two women "would not have knocked out [Aisha] Jones and Erica Dawson's eyewitness testimony. [8a]

This conclusion by the Third Circuit Court of Appeals not only highlights the blatant misconduct by the prosecutor in this case, this ruling also highlights the ineffectiveness of counsel in this matter. The evidence of flight that the court is referring to in its decision, is centered around the testimony involving Damien "Naps" Wise and the Barber family. Counsel testified

during the October 5, 2000 evidentiary hearing that he feared calling the Barber family because they would have supplied the state with evidence of petitioner's flight. Counsel's claims of fear in not calling witnesses, should be absolutely rejected by this court. Trial counsel would like the court to believe that the State's application of flight was based on Wise and the Barber's testimony, when in fact, ***The State's application of flight was based on a meritless claim by the State that the petitioner fled to North Carolina and his father had to bring him back to New Jersey.*** That's why the flight charge was given! Not because of the reasons expressed through counsel's alleged fear. Trial counsel was fully aware that Philson ***NEVER*** fled to North Carolina after the incident. Counsel should have objected to the State's application of flight, because the very language in the flight application would unfairly prejudice petitioner, especially in light of the State's earlier introduction of Wise's perjured testimony.

For example:

TRIAL COURT'S INSTRUCTIONS

> There has been some testimony in this case which you may infer that a defendant fled shortly after the commission of the crime.
>
> If after a consideration of all the evidence, you find that a defendant, fearing that an accusation would be made against him on the charges involved in the indictment or an arrest by reason thereof, took refuge in flight for the purpose of evading the accusation or arrest, then you may consider such flight, in connection with all the other evidence of the State, as indication of proof of consciousness of guilt.

> The burden of proof is on the State, ladies and gentlemen, and it never shifts. It remains on the State throughout the entire trial. No burden with respect to proof is imposed on a defendant. He is not obligated to prove his innocence.

While this instruction by the trial court was correct in its language, the very fact that counsel allowed the State to introduce this erroneous flight charge, coupled with the perjured testimony of Wise, actually allowed the State to shift the heavy burden of proof onto petitioner. This action was not only unfair, but unreasonable and thus created a ***Due Process Violation!*** "Any shifting of the burden of proof must withstand constitutional scrutiny." *Patterson v. New York*, 432, U.S. 197, 210-211 (1977).

II. The Third Circuit Court Of Appeals' Denial Of Petitioner's Claims Of Ineffective Assistance Of Counsel Was Based On An Unreasonable Application Of Clearly Established Federal Law As Determined By The United States Supreme Court.

In upholding the lower court's decision in regards to Cawana Dawson, the Third Circuit Court noted that:

> We have examined the affidavit of Cawana Dawson and are inclined to view it with some skepticism. The affidavit was not filed until one and one-half years after the conviction without any explanation for delay. [7a]

The petitioner believes that the very fact that the Third Circuit Court of Appeals viewed Cawana Dawson's affidavit with some skepticism should have warranted the court to send the matter back to the district court for a hearing, consistently based on the court's skepticism. The petitioner requested a

rehearing to establish that trial counsel perjured himself at the October 5, 2000 hearing by claiming that he never was informed about Cawana Dawson and that petitioner wanted the Barber family called as alibi witnesses. (App. C, 12a)

The Third Circuit Court of Appeals never addressed the denial of petitioner's request for a rehearing before the district court.

Instead, the court came to the conclusion that Cawana's impeachment testimony would not have affected the results of the trial. To the contrary, the petitioner believes that the record clearly demonstrates that Cawana Dawson's testimony is much more than what will be normally considered impeachment testimony. Cawana's affidavit strikes at the very heart and soul of the State's case. Cawana's affidavit is exculpatory in all aspects, mainly because Cawana's affidavit pertains directly to the guilt or innocence of the petitioner. Aisha Jones and Erica Dawson were with the victim when he was fatally shot and killed. Both witnesses identified the petitioner as the lone assailant. Despite the fact that both witnesses claimed that the petitioner shot the victim, Erica Dawson and Aisha Jones were never asked to provide a physical description of petitioner. The only identification that Erica Dawson and Aisha Jones were asked to provide was the description of the clothing worn by petitioner at the time of the shooting. In regards to the inconsistent statements surrounding the two coats in question, the Third Circuit Court of Appeals found that:

> Essentially, the [affidavit of Cawana] states that the two teenagers were unsure of the identity of the shooter and whether he wore a brown or green jacket. That discrepancy, while significant, was already revealed in the statements given to police, and was explored during the trial testimony. [7a]

Although there was some cross examination in regards to the switching of coats, the very fact that these witnesses ***never*** knew petitioner prior to the night in question was never revealed or explored by trial counsel at anytime whatsoever.

A. Significance Of Counsel's Exploration

Almost three years before Cawana Dawson even came forward with her affidavit, the record indicates that the very fact that Aisha Jones and Erica Dawson claimed to have known petitioner prior to the night in question was suspect. Not only based on the fact that both witnesses gave different accounts of what petitioner allegedly wore and did on the night in question, but their conflicting stories leading up to trial about how they actually knew petitioner, should have signaled a red flag to counsel. When petitioner informed counsel that he never knew Erica Dawson and Aisha Jones before the night in question, counsel immediately should have predicated his entire strategy on demonstrating that Erica Dawson and Aisha Jones never knew petitioner prior to the night in question. Prior knowledge was a key factor for the State. So much so, that the State was able to argue to the jury that Aisha Jones and Erica Dawson were friends of the petitioner. This assertion by the State was extremely significant. The State was stern in trying to establish prior knowledge.

There was absolutely no challenge to this testimony by trial counsel. Although the pre-trial discovery had revealed crucial evidence to contradict this key element of the State's case (prior knowledge), counsel choose not to challenge this evidence. Although Erica Dawson claimed that she knew petitioner for roughly two and a half years because of an alleged relationship petitioner had with Cawana Dawson, the first signs that her prior knowledge testimony was suspect was when Erica Dawson

appeared before the grand jury and the following exchange occurred:

Q. Can you tell the grand jury what you saw?

A. I saw Patrice shoot Eric.

Q. Who was Patrice?

A. I don't know him— I know him, but I don't know him that good.

Q. You don't know his last name?

A. Philson

Q. But at the time on February 1st you just knew him as Patrice?

A. Yes!

This admission by Erica Dawson was critical to petitioner and should have never been overlooked by counsel. There was significant evidence in the pre-trial discovery to warrant any reasonable counsel to further investigate petitioner's claims that he never knew Erica Dawson or Aisha Jones. For example:

1. There was never a police or photo line-up in this case.

2. Erica Dawson was never asked at anytime whatsoever to provide a physical description of petitioner, despite the fact that she claimed petitioner was the gunman.

3. Erica Dawson gave a different account of what the petitioner allegedly wore at the time in question.

4. Petitioner informed counsel prior to trial that he never knew Erica Dawson.

Aisha Jones' prior knowledge testimony was far more puzzling than Erica Dawson's prior knowledge testimony. First Aisha Jones claimed in her statement to police that she knew the petitioner for roughly two and one-half months and she met petitioner through her cousin Erica (referring to Erica Dawson). Aisha Jones later testified before the grand jury that she knew the petitioner through her cousin Cawana because the petitioner used to go with her cousin Cawana (referring to Cawana Dawson). Then Aisha changed her prior knowledge testimony yet a third time, and claimed that she knew petitioner because petitioner used to go with her cousin Felicia (referring to Erica and Cawana's other sister). These inconsistent statements on exactly how Aisha Jones knew petitioner prior to trial were critical and should have never been dismissed as an indication that Aisha Jones was simply confusing the names of the Dawson sisters. [***As dismissed by the district court during petitioner's evidentiary hearing without any evidence to support the court's actions***.] Rather than explore the fact that Aisha Jones' prior knowledge testimony changed so often because Aisha Jones never knew the petitioner, the district court simply dismissed Aisha Jones' actions as a misquote.

For the district court to just assume that the actions of Aisha Jones were a misquote without any evidence to support the court's assumption is wrong! The Third Circuit Court of Appeals' decision that upheld the district court's rulings, in light of the district court's many assumptions during the evidentiary hearing, was wrong and resulted in an unreasonable application of clearly established Federal Law. *Bell v. Cone*, 535 U.S. 685 (2002).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court ruled that: In order for a defendant to prevail on a claim of ineffective assistance of counsel, he must satisfy a two prong test: 1. A defendant must demonstrate that his counsel's performances was deficient. *See id.* at 687. To establish this deficiency, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688.

In making the objective evaluation as to counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

2. The second prong of this test is to demonstrate that counsel's errors resulted in prejudice to the defendant during the proceedings. *See id.* at 687. To satisfy this second prong, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

As to the first part of the *Strickland* test, the petitioner believes that counsel's performance was deficient for the following reasons:

1. Counsel failed to conduct ***any*** sort investigation into petitioner's claims that he didn't know Erica Dawson and Aisha Jones before trial.

2. Counsel failed to attack the State's position that Aisha Jones and Erica Dawson actually knew the petitioner prior to the incident in question.

3. Counsel failed to cross examine the State's eyewitnesses as to their prior knowledge claim in light of their many conflicting statements and testimony before and during trial.

4. Counsel failed to request a *Wade* hearing in this matter.

5. Counsel failed to question the detectives as to why there was never a police or photo line up in this case.

6. Counsel failed to call Cawana Dawson as a witness as requested by petitioner.

The very fact that counsel knew that neither Aisha Jones or Erica Dawson were ever asked about the physical identity of the petitioner, along with the fact that there were massive inconsistencies involving the only physical means of identification that these girls did make, the coats, should have warranted counsel to subject these witnesses' prior knowledge testimony to meaningful adversarial testing as is required by law. *United States v. Cronic*, 466 U.S. 648 (1984). As to the second and most difficult prong of the *Strickland* test, the petitioner believes that a brief analysis of the Third Circuit Court Of Appeals findings in this matters is needed to best highlight the petitioner's claims. The Third Circuit Court ruled in its October 9, 2003 decision that:

> Moreover, the affidavit accused Erica of misstating the fact that she had known Philson because he "used to go with my sister Cawana." The affidavit is incorrect in this respect because at trial Erica did not mention Cawana at all. Rather it was Aisha Jones who testified that she had known Philson because "he used to go with Felicia, Erica's sister"

> not Cawana. A crucial point of the affidavit, therefore, was incorrect and undermines much of Cawana's accusation that Erica had lied on the witness stand. [7a]

This finding by the court is not entirely supported by the record. Although the court was correct in pointing out the fact that Cawana's affidavit mentioned that Erica testified at trial that she met petitioner through Cawana when Erica didn't actually mention Cawana *by name* at trial, the petitioner believes that the Third Circuit Court is inadvertently losing sight of the context of Erica Dawson's testimony and Cawana Dawson's affidavit.

Although Erica didn't used the name Cawana (verbatim) during trial, clearly, Erica's trial testimony that she had actually known petitioner at all was based on her prior police statement that she had known petitioner for 2 years because "he used to go with Cawana." The Third Circuit Court is losing sight of the fact that Erica used Cawana Dawson at the very outset to establish a prior knowledge relationship with petitioner. The very prior knowledge claim originated in Erica Dawson's statement and continued through out the case. Erica Dawson's very testimony during the trial that she had known the petitioner for two years was the exact statement she gave to police, *less* the name Cawana Dawson at trial.

The very crux of Cawana Dawson's affidavit is that Aisha Jones and Erica Dawson perjured themselves before and during trial. Cawana's affidavit is unwavering in demonstrating this fact. Now as to the second prong of the *Strickland* test, the petitioner believes that, had it not been for trial counsel's deficient performance, the results of the proceeding would have been different. Trial counsel should have presented Cawana

Dawson's testimony to refute the testimony of Aisha Jones and Erica Dawson. Had counsel exposed these critical factors to the jury, the results of the proceedings would have been different. These critical factors are:

1. Aisha Jones was not a cousin of Erica, Felicia and Cawana Dawson like she claimed in her statement to the police and testimony before the grand jury.

2. Cawana Dawson was never involved in a relationship with petitioner and never introduced petitioner to Jones or Erica Dawson.

3. Confirm with Cawana Dawson that the petitioner was never involved in a relationship with any Dawson sister, and call Felicia Dawson as well to demonstrate that she (Felicia) never introduced petitioner to Jones or Erica, and was never involved with petitioner.

Had counsel done any sort of investigation in this case, counsel could have exposed a plethora of exculpatory evidence on his client's behalf. This plethora of exculpatory evidence is as follows:

1. The fact that Cawana Dawson spoke with Erica Dawson and Aisha Jones hours after the murder and both witnesses confided in Cawana Dawson that their friend had just been shot and they had no idea who had shot him.

2. The fact that Cawana Dawson provided Erica and Jones with a physical description of petitioner.

3. The fact that Cawana Dawson saw and heard Erica and Jones debating over what they told police the petitioner was wearing that night.

Counsel's failure to investigate in this case was not limited to counsel not investigating petitioner's claims that he didn't know Erica Dawson and Aisha Jones.

B. The Barber Family

Trial counsel testified at the October 5, 2000 hearing before the district court that his investigation in this case consisted of his reading the pre-trial discovery and knowing what the problems were. As highlighted earlier in petitioner's argument before this court, counsel's claim that petitioner wanted the Barber family called as alibi defense witnesses was an attempt by counsel to justify his own faulty actions. Some sort of investigation in this matter was most appropriate, especially in light of the fact that counsel indicated to the jury that he was not even sure if the Barber family actually even existed. The very fact that counsel doubted the existence of the Barber family should have warranted counsel to investigate the Barbers to determine if they actually existed. The fact that petitioner flat-out informed counsel he was never in the Barber's home should have warranted counsel to investigate. Even if counsel, for whatever reason, doubted petitioner's own claims that he was never inside the Barber's home, the reports by two of the State's investigators that indicated that Philson was never inside the home should have warranted counsel to investigate. In a recent decision by the United States Supreme Court, such inaction by counsel has been deemed to be ineffective. *Wiggins v. Smith*, 539 U.S. __, 123 S. Ct. 2527 (2003) (finding that: "In assessing reasonableness of attorney's investigation, courts must consider not only quantum of evidence already known to counsel, but also whether known evidence would lead reasonable attorney to investigate further". *Id.* at 2538. Counsel should have

investigated the Barber family to determine the following factors:

1. What was the demeanor of the petitioner when they saw him that night?

2. Had petitioner ever stopped by the Barber home at that time in the past?

3. Had petitioner ever been refused entry into the Barber home in the past?

4. What was petitioner wearing when they saw him?

5. Under what means did the petitioner arrive and leave when you saw him? Car, Bus, Walk, Run etc.!

Had counsel investigated the Barber family before trial, and gathered such information from the Barber family as to whether or not the petitioner seemed normal, agitated, nervous, scared or whatever, this could have proven invaluable information to trial counsel. Knowing whether or not petitioner had ever been refused entry in the past, coupled with testimony as to petitioner's demeanor on the night in question, could have provided counsel the necessary tools to make a "reasonable" and "strategic" decision whether or not to call the Barber family as defense witnesses. For counsel to not even interview or call the Barber family as witnesses in this case is a clear sign of counsel's ineffectiveness.

In the *Wiggins* case, this court had the benefit of assessing the actions of a counsel who at some point in time did some sort of investigation, which the court ultimately ruled was insufficient. In this case, this court is faced with a trial attorney

who did absolutely nothing! Refusing to conduct some sort of investigation in this case, should never be deemed a "reasonable professional decision" by trial counsel. "Courts are not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all" *See e.g., Loyd v. Whitley*, 977 F.2d 149, 158 (5th Cir. 1992) (The crucial distinction between strategic judgment calls and plain omissions has echoed in the judgment of this court.); *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990) ("Tactical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum."); *Profitt v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987) (*Strickland*'s measure of deference "must not be watered down into a disguised form of acquiescence."); *id.* at 1249 (refusing to indulge presumption of reasonableness as to "tactical" decision that afforded no advantage to the defense) Counsel's decision to forego a defense in a murder case is clearly ineffective. The petitioner believes that as to the first prong of the Strickland test, counsel's performance was deficient because counsel failed to:

1. Interview or investigate witnesses

2. Object to the erroneous flight charge

3. Object to the State's introduction of Damien "Naps" Wise's testimony.

As to the Second prong of the *Strickland* test, petitioner believes that counsel's action caused undue prejudice sufficient to warrant habeas corpus relief based on:

1. The perjured testimony by Wise was introduced for the sole purpose of swaying the passions and emotions of the jury with no objection by trial

counsel, even though the State supplied counsel with evidence to demonstrate 100% that the testimony was perjured.

2. Counsel's failure to object to the State's erroneous flight charge, which cleary prejudiced petitioner.

3. Counsel's failure to argue that the state's admission of knowingly perjured testimony, in partnership with the State's flight charge would go directly to the guilt or innocence of petitioner and cause undue prejudice.

4. Counsel's failure to call the entire Barber family as witnesses to refute the excruciatingly prejudicial testimony offered by Wise.

If one single juror believed that petitioner was hiding inside the Barber's home, there has been a gross miscarriage of justice. If one single juror believed that Philson asked questions about the murder, then laughed when told that the victim was laying on the ground gurgling on his own blood, there has been a gross miscarriage of justice. This petitioner is well aware of this court's findings as they apply to the juror's determinations, *see Apprendi v. New Jersey*, 530 U.S. 466 (2000). However, how can the jury be expected to fairly weigh the evidence and render a just determination, if they are deliberately presented with perjured evidence?

The petitioner would pray that this court issue a writ of certiorari to determine the merits of this case.

III. The Third Circuit Court Of Appeals Incorrectly Applied The United States Supreme Court Standards In Light Of This Court's Recent Findings In The Matter Of *Wiggins v. Smith*, 123 S. Ct. 2527.

Prior to the Third Circuit Court of Appeal's review of this action, the court sent a letter to petitioner's counsel advising counsel of the United States Supreme Court's recent decision in the matter of *Wiggins v. Smith*, 123 S. Ct. 2527. The court's letter advised counsel that he should submit a supplemental brief in light of the Supreme Court's action in the *Wiggins* case.

The Third Circuit Court of Appeals in applying the *Wiggins* case noted that:

> As the Supreme Court explained "[t]he state court's application must have been 'objectively unreasonable'". *Wiggins v. Smith*, 123 S. Ct. 2527, 2543 (2003)

Although the court was correct in analyzing the Supreme Court view of *Wiggins* in respect to the state court's application, the Third Circuit Court of Appeals failed to extend its analysis to a ***new and vital aspect*** of the Wiggins case, that the State courts never had the benefit to do because of the recent finding in *Wiggins*. In the Supreme Court's finding in the *Wiggins* case, the court ruled that:

> In assessing reasonableness of attorney's investigation, courts must consider not only quantum of evidence already known to counsel, but also whether known evidence would lead reasonable attorney to investigate further.

The Third Circuit Court of Appeals never considered this new and vital aspect of the Supreme Court's finding in *Wiggins*.

The State courts obviously couldn't examine counsel's action in this new light because the *Wiggins* case and this new standard hadn't yet been established. The Third Circuit Court Of Appeals was left with the task of subjecting counsel's action to this new standard, but failed to do so. An examination of counsel's action in respect to the Supreme Court's finding in the Wiggins case was critical to this petitioner. An examination by the court would have allowed petitioner to fully establish his claim of ineffective assistance of trial counsel. The petitioner would ask that a writ of certiorari be issued to allow this court to consider whether or not the lower court misapplied this court's standards in *Wiggins v. Smith*, 123, S. Ct. 2527

IV. The District Court Committed An Abuse Of Discretion By Rendering A Decision That Was Never Supported By The Record In Violation Of Clearly Established Federal Law As Determined By The United States Supreme Court.

The fact that counsel never even looked into the prior knowledge sparked this interesting analysis by the district court during the evidentiary hearing. District Judge William H. Walls U.S.D.J. found that:

> The failure to call Cawana may well be considered ineffective assistance of counsel, that is to say one could say in getting a case if an eyewitness says she knows someone as a result of having met him through someone else, it seems to me any "reasonable attorney" could well have said well let me go and interview that person just to see what were the circumstances of the introduction.

This analysis by the court only highlights the ineffectiveness of counsel in failing to investigate. However, the most

objectively unreasonable application of clearly established federal law occurred when the district court further added that:

> But I don't think that is really necessary in the context of there being a determination that Mr. Philson did have and was introduced to various people by Dawson's sister, by a Dawson sister.
>
> Secondly, there is no indication in the, to take it to another view, there's nothing in the reports that would compel what I just said. It's not a contradiction. I'm just saying reasonable attorneys can differ. Some attorneys could be so fastidious that they might interview that person. Whereas another reasonable attorney might not deem it appropriate because it's not really necessary. The question is whether these people knew this person sufficiently so that they could say that he is the one who pulled the weapon and shot the protesting victim, and that is dependent on a lot of circumstances.
>
> It's noted that in trial there is recollection by both parties, I mean by both witnesses that there was conversation between the victim and the alleged shooter as well as others that they were all standing around. So consequently, it is not a situation where we are talking about testimony coming from people witnessing a drive by shooting and thereby just getting a glimpse of somebody. So I'm not really that impressed by the need for more factors going into the identification of the shooter than were presented to the trial court. You can go both ways. I know some lawyers might have done things differently.

> Whether what Vantuno did was unreasonable, I'm not prepared to say. I find that what he did was reasonable under the circumstances with regard to not calling Cawana. And even assuming that her name was given to him by the defendant, I do not believe the name was given in the context of being called as a defense witness. Because it seems to me that if she had testified, all she would have done, all any astute counsel could have done was said do you have another sister and what's her name and does she know Philson. That would have removed any and all doubts whether Philson had a relationship with someone by the name of Dawson before this incident.

What makes this ruling by the lower court "objectively unreasonable" is the fact that the district court is ***clearly*** basing its decision on the faulty assumption that regardless of which Dawson, a Dawson sister or family member would have come forward and sealed the prior knowledge identification. This conclusion by the lower court is absolutely unreasonable and is not in accordance with clearly established Federal Law. *See* In *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995), Justice O'Connor wrote, "[i]t is a paridigmatic denial of due process to base a legal conclusion on an erroneous view of law." *Id.* at __, 115 S. Ct. at 870. In upholding counsel's decision as reasonable under the circumstances, the district court is inadvertently providing counsel an excuse to justify his faulty actions under the cover of trial strategy. The Court has found that: *Post hoc* speculation regarding reasons for trial counsel's actions does not somehow render trial counsel's performances constitutionally adequate.

As explained by the Fourth Circuit, "Courts should not conjure up tactical decisions an attorney could have made, but plainly did not . . . Tolerance of tactical miscalculation is one

thing; fabrication of tactical excuses is quite another." *Griffin v. Warden*, 970 F.2d 1355, 1358-1359 (4th Cir. 1992) *see also Harris v. Reed*, 894 F.2d 871, 878 (7th Cir.) The petitioner believes that the court erred in ruling that Cawana Dawson's impeaching testimony would not have been enough to affect the results of the trial, thus resulting in a objectively unreasonable application of clearly established Federal Law as determined by the United States Supreme Court.

This petitioner also states that the decision of the lower courts conflicts with other Federal Courts of Appeals that have considered many of the same issues presented in this case. The United States Supreme Court has long established that: The right of trial by jury is an ancient origin, characterized by Blackstone as 'the glory of the English Law' and the most transcendent privilege which any subject can enjoy. *Dimick v. Schiedt*, 293 U.S. 474, 485-486, 55 S. Ct. 296, 300-301, 79 L. Ed.

Because the right to a fair and impartial jury is of such Constitutional significance, *United States v. Quarles*, 350 U.S. 21, 76 S. Ct. 1, and the lower courts' decisions were contrary to the United States Supreme Court's earlier decisions, the petitioner would pray that this court issue a writ of certiorari to determine the merits of these Constitutional issues.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

PATRICE PHILSON
a/k/a JUSTICE R. ALLAH
New Jersey State Prison
P.O. Box 861-#230948/640344B
Trenton, NJ 08625

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED OCTOBER 9, 2003

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-3658

PATRICE PHILSON, a/k/a JUSTICE ALLAH

Appellant,

v.

JAMES BARBO, Administrator, Northern States Prison; and THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

Patrice Philson,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C.Civ. No. 98-cv-02249)
District Judge: Honorable William H. Walls

Submitted Under Third Circuit L.A.R. 34.1(a)
October 3, 2003
Before: RENDELL, WEIS and GARTH, *Circuit Judges*.
Filed: October 9, 2003

Appendix A

OPINION

WEIS, *Circuit Judge.*

In 1990, a jury in the Superior Court of New Jersey convicted petitioner Philson of murder. After direct appeal and post-conviction proceedings in state court were unsuccessful, he filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the District Court of New Jersey.

The District Court held an evidentiary hearing and denied the petition. We granted a certificate of appealability limiting the issue, however, to whether Philson's trial lawyer's failure to interview certain witnesses constituted an inadequate defense.

The murder occurred about 2:30 a.m. on a street in downtown Newark, New Jersey. The victim had driven his automobile to the scene to collect some money. He was accompanied by two teenage girls, Aisha Jones and Erica Dawson. As the victim returned from his collection errand, he was accosted by three individuals, petitioner Philson, Hassan Carter and Damian Wise. The victim was shot while resisting an apparent robbery attempt, and died at the scene.

Philson and Carter were both indicted for the murder, but Carter was acquitted at trial. Philson retained John Vantuno, a former prosecutor and an experienced defense attorney, for representation at trial.

Both of the teenage girls, Jones and Dawson, testified that they saw Philson shoot the victim. In addition, witness

Appendix A

Glenn Copeland said that he heard an individual threaten the victim shortly before the shot was fired. In the courtroom, Copeland identified Philson as that person.

There were numerous inconsistencies in the evidence at trial. Witnesses differed as to whether the shooter wore a brown or green jacket and whether Philson and Wise had switched jackets. Wise testified that Philson had shot the victim and soon afterwards they encountered each other in an apartment near the scene occupied by Carolyn Moore and Loretta Barber. Wise said that Philson made damaging, inculpatory statements at that time. In their statements to the police, Barber and Moore denied that Philson and Wise had actually entered their apartment.

One and one-half years after the trial, Cawana Dawson submitted an affidavit disputing her sister Erica's alleged prior acquaintanceship with Philson and her identification of him as the person who had shot the victim.

In his post-trial proceedings, Philson contended that his attorney Vantuno was ineffective in failing to interview Cawana Dawson and call her as a witness. In addition, Philson challenged his lawyer's failure to call Moore and Barber. He asserts that they would have testified that they had refused him entry into their apartment and, thus, would have contradicted Wise's allegations about Philson's inculpatory statements.

Additionally, another witness, Quintina Holden, was not called. In her statement to the police she related that she had seen two girls take the coat from the victim after he was shot. She had not, however, witnessed the actual shooting.

Appendix A

These contentions were raised at the state post-conviction proceeding. After oral argument and a thorough review of the record, the state judge concluded that trial counsel had satisfied the minimum standards for effective assistance of counsel. The judge concluded that, "[i]t was the large corpus of insurmountable and incontrovertible evidence presented at trial, which included several eyewitnesses to the murder, which resulted in the defendant's conviction and [it] was not due to defense counsel's performance." Further, the judge found that "defense counsel could have reasonably chosen not to explore the specific avenues of examination proposed by [Philson] for fear that further inquiry might have exposed information detrimental to the defense." The state court's denial of Philson's post-conviction relief was affirmed on appeal. The New Jersey Supreme Court denied certification.

At the conclusion of Vantuno's testimony and extended argument in the District Court, the judge announced his decision from the bench. Assessing the record in accordance with *Strickland v. Washington*, 466 U.S. 668 (1984), the district judge stated, "I don't believe Vantuno's representation fell below an objective standard of reasonableness . . . [Even] assuming that it did, certainly the outcome would not have been different in all likelihood. . . ."

The court observed that Mr. Vantuno strongly denied ever hearing Philson speak of calling Cawana Dawson as a witness. The judge found, "I do not believe the name [of Cawana] was given to [Vantuno] by [Philson] in the context of being called as a defense witness." Even assuming that Philson was correct in stating that he gave Cawana's name to his lawyer, the judge noted that she had another sister

who might have been associated with Philson. In any event, the eyewitness testimony of the two teenage girls would not have been weakened to the extent of producing a different result at trial.

With respect to Barber and Moore, the judge noted that their testimony might have cast doubt on Wise's statements, but it would not have affected that of the two girls. Moreover, Vantuno said that he did not call Barber and Moore because their testimony would have provided the state with evidence of Philson's flight from the scene of the crime.

The district judge also discounted any value to the alleged knowledge of Quintina Holden. She did not see the shooting and her sighting of two girls taking a coat from the victim as he lay on the street would not have affected Jones and Dawson's testimony about the murder.

Our review of state habeas corpus claims is limited by the A.E.D.P.A., 28 U.S.C. § 2254. A petition may not be granted on claims adjudicated on the merits in state court unless the decision was contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding. 28 U.S.C. § 2254(d). As the Supreme Court explained "[t]he state court's application must have been 'objectively unreasonable.'" *Wiggins v. Smith,* 123 S.Ct. 2527, 2534, (2003).

Strickland v. Washington, 466 U.S. 668 (1984) provides the legal standard applicable to claims of ineffective counsel.

First, counsel's performance must have been deficient and, second, must have prejudiced the defense. As the Court said, "[s]tragetic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation . . . [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 690-91.

The state court followed federal law as articulated in the *Strickland* opinion. The issue here, therefore, is whether the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d)(2).

The state judge performed a very thorough review of the trial record after hearing extensive argument by counsel in the post-conviction proceeding. The only weakness in the case at that point was the absence of testimony from Vantuno. That deficiency, however, was remedied in the district court hearing where Mr. Vantuno testified at length on his conduct of the defense.

We have reviewed this case very carefully and conclude that the District Court did not err in dismissing the petition. Philson focused his challenge on three areas where counsel was allegedly ineffective and we will comment on each in turn.

Appendix A

First, Philson contends that he told Vantuno that Cawana Dawson should have been called as a witness. Vantuno denied that allegation and the district judge accepted that disavowal, "in the context of being called as a defense witness." Nonetheless, even assuming that Philson's allegation is correct, we feel that Cawana's impeaching testimony would not have been enough to affect the result.

We have examined the affidavit of Cawana Dawson and are inclined to view it with some skepticism. The affidavit was not filed until one and one-half years after the conviction without any explanation for the delay. Essentially, it states that the two teenagers were unsure of the identity of the shooter and whether he wore a brown or green jacket. That discrepancy, while significant, was already revealed in the statements given to the police, and was explored during the testimony at trial.

Moreover, the affidavit accused Erica of misstating the fact that she had known Philson because he "used to go with my sister Cawana." The affidavit is incorrect in this respect because at trial Erica did not mention Cawana at all. Rather, it was Aisha Jones who testified that she had known Philson because he "used to go with Felicia, . . . Erica's sister"—not Cawana. A crucial point of the affidavit, therefore, was incorrect and undermines much of Cawana's accusations that Erica had lied on the witness stand. Although Jones' testimony varied from that which she gave before the Grand Jury, where she linked Cawana rather than Felicia Dawson with Philson, it was the trial testimony which Cawana specifically challenged. We conclude that, even if called, Cawana's impeaching testimony would not have affected the result of the trial.

Philson also criticizes the decision not to call Barber and Moore to the stand. In the course of discovery, Vantuno had read the statements they had given to the police. Both statements allege that Philson and Wise came to their apartment in the early morning hours but had been refused entry because of the lateness of the hour. Philson contends that their testimony would have undermined Wise's damaging allegations of the petitioner's inculpatory statements made in that apartment.

As a matter of trial strategy, Vantuno decided not to call these women as witnesses because their testimony would have supplied evidence of Philson's flight. Giving appropriate deference to counsel's judgment in light of all the circumstances here, we cannot say he was ineffective in his strategic decision. Moreover, as the district judge pointed out, the testimony of these two women "would not have knocked out [Aisha] Jones and Erica Dawson's eyewitness testimony."

The third alleged dereliction of counsel was his failure to call Quintina Holden. While Ms. Holden did supply police with information about events immediately following the shooting, she could not furnish any evidence about the perpetrator because it was the shot that alerted her and caused her to go from her house to the scene. The fact that she saw two girls take the victim's coat and flee the scene would not have aided the defense. That evidence would have merely reflected upon the character of the two teenagers. It would not, as the district judge noted, have "undermine[d] the basic believability of their assertion that they saw petitioner shoot the victim." According to the district judge, the allegation

that such testimony would weaken their identification of the shooter "makes no professional sense to me and I don't buy it both as a lawyer and as a judge." We cannot disagree with that assessment.

The trial of this case was marked by a number of inconsistencies in the testimony of witnesses who were at the scene. These contradictions were explored by counsel at length and were submitted to the jury that had the duty to resolve them.

After our study of the record, we are satisfied that the district judge conducted a comprehensive hearing, giving petitioner and his counsel every opportunity to present the case. We note that the district judge even permitted Philson, acting pro se, to argue personally in addition to counsel's comprehensive presentation.

We find no reversible error and, accordingly, the judgment of the District Court will be affirmed.

TO THE CLERK:

Please file the foregoing Opinion.

/s/ Joseph F. Weis, Jr.
United States Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT REQUESTING CERTIFICATE OF APPEALABILITY DATED DECEMBER 27, 2002

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **01-3658**

PATRICE PHILSON

vs.

JAMES F. BARBO, ET AL.

(D. N.J. CIV. NO. 98-cv-02249)

Present: ALITO, ROTH and RENDELL, *CIRCUIT JUDGES*

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1), with supporting memorandum;

(2) Appellees' response in opposition; and

(3) Appellant's *pro se* reply to appellees' response in the above-captioned case.

Respectfully,

Clerk

Appendix B

MMW/CJG/clc

ORDER

The foregoing request for a certificate of appealability is granted with respect to appellant's claim that counsel rendered ineffective assistance by failing to interview, investigate, or call to the stand potentially exculpatory witnesses.

By the Court,
s/ [illegible]
Circuit Judge

Dated: FEB 27 2003

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED AUGUST 24, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 98-2249

PATRICE PHILSON a/k/a JUSTICE ALLAH,

Petitioner,

v.

JAMES F. BARBO, Administrator New Jersey State Prison, and JOHN J. FARMER, Attorney General of the New Jersey

Respondents.

OPINION

Walls, District Judge

Petitioner Patrice Philson a/k/a Justice Allah, moves for reconsideration of this Court's opinion denying his writ of habeas corpus pursuant to 28 U.S.C. §2254. His motion for reconsideration is denied.

FACTS AND PROCEDURAL BACKGROUND

The facts of this case were fully set forth in this Court's August 24, 2000 Opinion. However, a brief recital of the procedural history is helpful. Petitioner has been found guilty

of the February 1, 1990 murder of Eric Ford. Specifically, he was found guilty of First Degree Purposeful and Knowing Murder contrary to N.J.S.A. §2C:11-3(a)(1) and (6), and two weapons counts in New Jersey Superior Court, Essex County, Law Division. He was acquitted of robbery and felony murder charges. His co-defendant, Hassan Carter, was acquitted of all charges. Petitioner filed an appeal, and on December 29, 1992, the Superior Court, Appellate Division, affirmed the conviction. On February 23, 1993, the Supreme Court of New Jersey denied his petition for certification.

In May of 1993, Petitioner filed a *pro se* petition for post-conviction relief, and the public defender filed a supplemental brief. Petitioner raised several issues, including ineffective assistance of trial and appellate counsel, and demanded an evidentiary hearing. On July 31, 1995, the Law Division denied his petition. Petitioner appealed the denial, arguing again that he had received ineffective assistance of counsel, and that the Law Division erred in not ordering an evidentiary hearing on this claim. He demanded a new trial, or in the alternative, an evidentiary hearing on his ineffective assistance of counsel claim. The Appellate Division affirmed the denial of the petition for post-conviction relief on January 21, 1997. The Supreme Court of New Jersey denied his petition for certification on May 21, 1997.

Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. §2254 and §2241 in this Court on May 19, 1998. This Court granted Petitioner an evidentiary hearing to assess the effectiveness of his trial counsel, Mr. John Vantuno. The hearing was conducted on October 5, 2000. After testimony from Mr. Vantuno, and cross-examination

by Petitioner's counsel, the Court was satisfied that Mr. Vantuno did not render ineffective assistance of counsel pursuant to the standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984); *see also Berryman v. Morton,* 100 F.3d 1089, 1094 (3d Cir.1996). Petitioner has now filed the present motion asking this Court to reconsider its denial of his writ of habeas corpus.

DISCUSSION

1. Reconsideration Standard

Under Fed. R. Civ. P. 59(e), a litigant may move to alter or amend a judgment within ten days of its entry. Similarly, L.Civ.R. 7.1(g) allows a party to seek a motion for reargument or reconsideration of "matters or controlling decisions which counsel believes the Judge or Magistrate Judge has overlooked." The Third Circuit has held that the "purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki,* 779 F.2d 906, 909 (3rd Cir. 1985), *cert. denied,* 476 U.S. 1171 (1986). Reconsideration motions, however, may not be used to relitigate old matters, nor to raise arguments or present evidence that could have been raised prior to the entry of judgment. Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2810.1. "A party seeking reconsideration must show more than a disagreement with the Court's decision, and 'recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden.'" *G-69 v. Degnan,* 748 F. Supp. 274, 275 (D.N.J. 1990)

(*quoting Carteret Savings Bank, F.A. v. Shushan,* 721 F.Supp. 705, 709 (D.N.J. 1989), *appeal dismissed,* 919 F.2d 225 (3rd Cir. 1992)). Such motions will only be granted where (1) an intervening change in the law has occurred, (2) new evident not previously available has emerged, or (3) the need to correct a clear error of law or prevent a manifest injustice arises. *North River Ins. Co. v. CIGNA Reinsurance Co.,* 52 F.3d 1194, 1218 (3rd Cir. 1995). Because reconsideration of a judgment after its entry is an extraordinary remedy, requests pursuant to these rules are to be granted "sparingly," *Maldonado v. Lucca,* 636 F. Supp. 621 (D.N.J. 1986); Charles A. Wright, Arthur R. Miller & Mary Kay Kane, at § 2810.1, and only when "dispositive factual matters or controlling decisions of law" were brought to the court's attention but not considered. *Pelham v. United States,* 661 F. Supp. 1063, 1065 (D.N.J. 1987).

2. Analysis

A. Petitioner's Argument

Petitioner lists several grounds for this court to grant his motion for reconsideration. First as to the ineffective assistance of counsel claim, petitioner argues that this Court never considered evidence that his trial counsel, Mr. John Vantuno lied about his knowledge about certain witness, and that he never offered an alibi defense, despite his post-facto excuses at the October 5 evidentiary hearing that he had.

First, petitioner asserts that not only did Mr. Vantuno know in advance about the existence of a key witness, Cawana Dawson, but also that there is clear evidence that

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Mr. Vantuno committed perjury when he testified in court that he was never informed about certain witnesses, and he never spoke to any witness in the case. (Pet. Br. 1).

In trial transcripts dated October 10, 1990, Mr. Vantuno informed the trial judge, the Honorable Paul T. Murphy, that a witness stated that regardless of who shot and killed Eric Ford, they saw what appeared to be Mr. Ford hit the gun before it went off. (Pet. Br. 2). The trial judge instructed Mr. Vantuno to get the witness into court the next day. Mr. Vantuno responded to the trial judge that he tried to get the witness into court, and that he even spoke with him. *Id.* citing trial transcripts dated October 10, 1990 / 2T pg. 148 - 150).

If Mr. Vantuno's statements in 1990 were true, then he committed perjury at the October 5, 2000 hearing when he stated that he never spoke to, or interviewed any witnesses in this case, asserts Petitioner. This alleged perjury is critical to the ineffective assistance of counsel claim because Petitioner has always maintained that Mr. Vantuno was informed of several witnesses, but neglected to call these potentially exculpatory witnesses at trial. Petitioner also alleges that Mr. Vantuno perjured himself a second time when he stated at the October 5, 2000 hearing that Petitioner never informed him of other witnesses other than Barber and Moore.

Petitioner also claims that at the state trial he did not testify on his own behalf because Mr. Vantuno discouraged him by stating that Judge Murphy indicated it was too late for him to testify. Vantuno also warned Petitioner against

testifying for fear that it may prejudice him in the eyes of the jury because of some of the factual inconsistencies in the case. (Pet. Br. 4). Petitioner alleges that Mr. Vantuno lied to him, that in fact, Judge Murphy never told Vantuno that it was too late to call witnesses, or that certain witnesses could not be called. Petitioner also asserts that Vantuno's advice to him not to testify was error.

Petitioner seeks reconsideration of this Court's decision denying his petition for habeas corpus because his counsel at the October 5, 2000 habeas hearing, Edward Jerejian, was not permitted to directly confront Mr. Vantuno with his inconsistent statements, indeed perjured testimony, as to whether he was informed of several key witnesses.

1. Has the Strickland Test Been Met?

Petitioner says that had the court considered this evidence, his ineffective assistance counsel claim would prevail. Petitioner states that he has met the standard in *Strickland v. Washington,* 466 U.S. 668 (1984).

An ineffective assistance claim must satisfy the two-prong test articulated by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984); *see also Berryman v. Morton,* 100 F.3d 1089, 1094 (3d Cir.1996). To meet the first prong of this test, a petitioner must demonstrate that his counsel's performance was "deficient." *See Strickland,* 466 U.S. at 687. To establish deficiency, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In making an objective evaluation as to counsel's

performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

For the second prong, the petitioner must demonstrate that counsel's errors resulted in prejudice to the petitioner, *see id.* at 687, such that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The second prong of *Strickland* requires a demonstration of how specific errors undermined the reliability of the guilt-determination process. *See United States v. Cronic,* 466 U.S. 648, 659 n.26 (1984). Absent some effect of defense counsel's conduct on the trial process' reliability, the Sixth Amendment guarantee is generally not implicated. *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993). Moreover, matters of trial strategy and tactics do not often constitute constitutional violations to merit habeas corpus relief. *Reese v. Fulcomer,* 946 F.2d 247, 257 (3d Cir. 1991), *cert. denied,* 503 U.S. 988 (1992).

Petitioner first alleges that trial counsel's performance was deficient. Namely, petitioner asserts that Vantuno outright perjured himself at the October 5, 2000 hearing when he said that he was not aware of, and did not interview potential alibi witnesses. And this, coupled with Vantuno's trial tactics, specifically not calling alibi witnesses, and encouraging petitioner not to testify, was "deficient." Petitioner asserts that but for these constitutional errors, the outcome of the proceedings would have been different. Specifically, Cawana Dawson could have been called to refute

the testimony that Erica Dawson and Aisha Jones, who were eyewitnesses, knew Petitioner prior to February 1, 1990. Also, the main eyewitness in the case, Glenn Copeland, identified the shooter as a Puerto-Rican (Pet. Br. 9) and not African American, as is petitioner. Yet, Mr. Copeland was never cross-examined. This is yet another example of ineffective assistance of counsel, says petitioner. Petitioner asserts that these compounding errors prejudiced him, and that there is a reasonable probability that but for counsel's unconstitutional errors, the outcome of the proceedings would have been different. So the second prong of *Strickland* is also met, asserts Petitioner.

B. Respondent's Argument

In opposing the reconsideration motion, Respondent State of New Jersey does not attack any of Petitioner's factual allegations, but rather argues that Petitioner has not met the Reconsideration standard under Local Civil Rule 7.1(g).

The standard for granting a reconsideration motion is very high. The Third Circuit has pointed out that the purpose of such a motion is to allow the Court to "correct manifest errors of law or fact" or to consider "newly discovered evidence." *Harsco Corp. v. Zlotnicki,* 779 F.2d 906, 909 (3d Cir. 1986), *cert. den.,* 476 U.S. 1171 (1986). Generally, relief under the rule is granted 'very sparingly'. *United States v. Jones,* 158 F.R.D. 309 (D.N.J. 1994). Specifically, the moving party must set forth the controlling facts or law that the Petitioner believes the judge overlooked. *United States v. Compaction Sys. Corp.,* 88 F.Supp.2d 339, 345 (D.N.J. 1999). The moving party fails to carry its burden by "merely

recapitulating the cases and arguments considered by the Court before rendering its original decision. *Elizabethtown Water Co. v. Hartford Casualty Ins. Co.*, 18 F.Supp.2d. 464, 466 (D.N.J. 1998).

Case law from this Circuit is clear that motions for reconsideration can only cure situations where evidence was presented to the court but not considered. *See United States v. Jones*, 158 F.R.D. 309 (D.N.J. 1994), *quoting Pelham v. United States*, 661 F.Supp. 1063, 1065 (D.N.J. 1987) ("[i]n fact, such motion is only granted when 'dispositive factual matters or controlling decisions of law were presented to the court but not considered.'") In interpreting the rule, courts have held that a judge can only overlook matters as to facts and legal arguments which were appropriately presented to the court at the time the motion in which reargument is sought was initially decided. Therefore, a moving party's effort to expand the reargument to include matters that were not presented before the court in the original motion, but that are submitted after the motion has been decided have been rejected. *See Florham Park Chevron Inc., v. Chevron U.S.A., Inc.*, 680 F.Supp. 159 (D.N.J. 1988).

Petitioner, claims however, that it is not merely regurgitating old arguments, but is moving for reconsideration based on relevant law or facts overlooked by this Court. He contends that this Court overlooked the fact that Mr. Vantuno perjured himself at the October 5, 2000 hearing when he stated that he was not informed of any potentially exculpatory witnesses, he had actually spoken to a few of the witnesses he claimed at the hearing to never

have heard of. Had the Court considered this, it may have found that petitioner's ineffective assistance of counsel claim to have merit.

However, Respondent State of New Jersey contends that this Court has not "overlooked" any matters or controlling case law cited to it. The word "overlooked" is the dominant term in the rule. *See Resorts Int'l, Inc. v. Great Bay Hotel and Casino, Inc.*, 830 F.Supp. 826, 831 (D.N.J. 1992). However, mere disagreement with a court's decision is inappropriate on a motion for reconsideration, and should normally be raised through the appellate process. *Id.*; *see also Florham Park Chevron Inc. v. Chevron U.S.A., Inc.*, 680 F.Supp. 159, 162 (D.N.J. 1988).

The State of New Jersey argues that this Court granted petitioner an evidentiary hearing on his claim of ineffective assistance of counsel, taking testimony and fully considering both his oral and written arguments. Petitioner has added nothing new in terms of pertinent facts or case law overlooked by this Court, says Respondent. In Respondent's view, Petitioner merely seeks to reargue this Court's Order of October 5, 2000. This fails to satisfy the reconsideration standard under Local Rule 7.1(g), so his motion should be denied, says Respondent.

The Court finds that petitioner has not met the reconsideration standard. He has presented no relevant legal authorities or facts overlooked by this Court. His complaints concern his trial counsel's alleged lies about not knowing about certain alibi witnesses. However, this Court had a full day evidentiary hearing where his trial counsel, Mr. Vantuno

was subject to direct and cross examination. At the hearing, petitioner's counsel spent a lot of time cross-examining Vantuno as to his knowledge of alibi witnesses, and his motivations behind some of his trial strategies, such as the calling of witnesses and producing of evidence. The Court reminds Petitioner that matters of trial strategy and tactics do not often constitute constitutional violations to merit habeas corpus relief. *Reese v. Fulcomer,* 946 F.2d 247, 257 (3d Cir. 1991), *cert. denied,* 503 U.S. 988 (1992). After hearing this testimony, this Court ruled in October 2000 that petitioner had not established that his trial counsel rendered ineffective assistance of counsel pursuant to *Strickland v. Washington,* 466 U.S. 668 (1984). Petitioner has brought nothing to this Court's attention to change this outcome, so the petition for reconsideration is denied.

CONCLUSION

For the reasons given in this opinion, Petitioner Philson's motion for reconsideration pursuant to L. Civ. R. 7.1 (g) is denied.

s/ August 22, 2001
Dated

s/ William H. Walls
William H. Walls, U.S.D.J.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED AUGUST 24, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 98-2249

PATRICE PHILSON a/k/a JUSTICE ALLAH,

Petitioner,

v.

JAMES F. BARBO, Administrator New Jersey State Prison, and JOHN J. FARMER, Attorney General of the New Jersey

Respondents.

ORDER

Walls, District Judge

Petitioner Patrice Philson, a/k/a Justice Allah moves to Reconsider this Court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. For the reasons given in the accompanying opinion, and for good cause shown,

It is on this 22 day of August, 2001:

ORDERED that the Motion for Reconsideration is DENIED.

s/ William H. Walls
William H. Walls, U.S.D.J.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED OCTOBER 23, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 98-2249 (WHW)

PATRICE PHILSON a/k/a/ JUSTICE ALLAH,

Petitioner,

v.

JAMES F. BARBO, Administrator, New Jersey State Prison, and PETER VERNIERO, Attorney General of New Jersey,

Respondents.

ORDER

WALLS, District Judge

Patrice Philson petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and § 2243. The Court, having reviewed Philson's petition and respondents' answer, having taken testimony from petitioner's trial attorney, John Vantuno, Esq, at a hearing on October 5, 2000, having heard argument from petitioner, his counsel, Edward Jerejian, Esq., and counsel for respondents, Gerard C. Sims, Jr., DAG, and for the reasons stated in the Court's oral opinion of October 5, 2000:

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It is on this 20th day of October, 2000 hereby ORDERED that Patrice Philson's petition for a writ a habeas corpus is DENIED; and it is further

ORDERED that no certificate of appealability will issue.

SO ORDERED:

s/ William H. Walls
William H. Walls, U.S.D.J.

s/ 20 [illegible] 2000
Dated

APPENDIX F — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED AUGUST 24, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 98-2249 (WHW)

PATRICE PHILSON a/k/a JUSTICE ALLAH,

Petitioner,

v.

JAMES F. BARBO, Administrator, New Jersey State Prison, and PETER VERNIERO, Attorney General of New Jersey,

Respondents.

OPINION

WALLS, District Judge

This matter comes before the Court on the petition for a writ of habeas corpus filed under 28 U.S.C. § 2254 and § 2241 by Patrice Philson ("Petitioner") on May 19, 1998.

I. PROCEDURAL HISTORY

On March 8, 1990, Petitioner and co-defendant Hassan Carter were indicted on five counts in New Jersey Superior Court, Essex County, Law Division: First Degree Robbery

contrary to N.J.S.A. § 2C:15-1; First Degree Felony Murder contrary to N.J.S.A. § 2C:11-3(a); First Degree Purposeful and Knowing Murder contrary to N.J.S.A. § 2C:11-3(a)(1) and (6); Third Degree Unlawful Possession of a Weapon contrary to N.J.S.A. § 2C:39-5(b); and Second Degree Possession of a Weapon for an Unlawful Purpose contrary to N.J.S.A. § 2C:39-4(a). Petitioner plead not guilty to all charges and his case went to jury trial in October of 1990.

On October 16, 1990, the jury found Petitioner guilty of purposeful and knowing murder, and the two weapons counts. He was acquitted of robbery and felony murder charges. His co-defendant, Hassan Carter, was acquitted of all charges. The trial court merged the weapons charges with the murder charge, and sentenced Petitioner to life in prison with thirty years mandatory minimum without parole. The trial court also imposed a $30 Violent Crimes Compensation Board penalty. Petitioner filed an appeal, and on December 29, 1992, the Superior Court, Appellate Division, affirmed the conviction. On February 25, 1993, the Supreme Court of New Jersey denied his petition for certification.

In May of 1993, Petitioner filed a pro se petition for post-conviction relief, and the public defender filed a supplemental brief. He raised several issues, including a claim that he had received ineffective assistance of trial and appellate counsel, and demanded an evidentiary hearing. On July 31, 1995, the Law Division denied his petition by written decision. Petitioner appealed the denial, arguing again that he had received ineffective assistance of counsel, and that the Law Division had erred in not ordering an evidentiary hearing on this claim. He demanded a new trial, or in the

alternative, an evidentiary hearing on his ineffective assistance of counsel claim. The Superior Court, Appellate Division affirmed the denial of the petition for postconviction relief on January 21, 1997. The Supreme Court of New Jersey denied his petition for certification on May 21, 1997.

II. FACTUAL BACKGROUND

In the early morning hours of February 1, 1990, Eric Ford drove his car to the intersection of Sixth Avenue and Thirteenth Street in Newark, New Jersey, accompanied by Aisha Jones, age 16, and Erica Dawson, age 13. While his passengers remained seated in the car, Ford got out to talk to Hassan Carter, Damien Wise[1], and several other men who were standing around a hot dog truck parked nearby. Ford and Carter walked away talking, and walked back after Carter gave Ford some money. Carter then rejoined Petitioner, Wise, and the other men near the hot dog truck as Ford walked back to his car.

There is much dispute and conflicting trial testimony as to what happened next. Apparently, Ford returned to the hot dog truck and began arguing with Petitioner, Carter, and Wise. Erica Dawson, Aisha Jones, and Damien Wise all testified that as Petitioner stood next to Carter and Wise, he pulled out a black gun and shot Ford one time. However, while Jones described Petitioner as wearing a green "Jets" jacket, Dawson testified that Petitioner wore a brown "49ers" jacket. Another witness, Michael Faison, testified that Wise was wearing the green "Jets" jacket at the time of the shooting. There is also

1. Throughout the proceedings and transcript, Damien Wise is sometimes referred to by his nickname "Naps" or "Nap's".

disputed testimony about whether or not Wise and Petitioner switched jackets prior to the shooting. *See, e.g.*, 2 Tr. at 16-25 (Aisha Jones testified that Petitioner and Wise switched jackets so that Petitioner wore a green "Jets" jacket owned by Wise, and Wise wore a brown "49ers" jacket owned by Petitioner); 3 Tr. at 9293 (Wise testified that he wore his green "Jets" jacket, and never switched with Petitioner).

There is also conflicting testimony as to what happened following the shooting. Erica Dawson and Aisha Jones testified that after Petitioner shot Ford, they got out of the car and fled. They testified that they saw Wise get in Ford's car and drive away. Yet, Wise testified that he fled the scene on foot, and that Petitioner drove Ford's car away. Several other witnesses at the scene, Michael Faison, Charlie Hall, and Glenn Copeland, could not identify the shooter. These witnesses and other witnesses also provided conflicting accounts of who drove Ford's car away from the scene.

Wise testified that following the shooting, he went to the home of Carolyn Moore and Loretta Barber, where he found Petitioner hiding. He stated that Petitioner asked him if Ford was dead, and Petitioner laughed when Wise told him that Ford was gurgling on his own blood. Ford died of a single gunshot wound to the chest. At 3:30 a.m., Newark Police arrived and took statements from several witnesses. Petitioner turned himself in on February 7, and later in the day Jones and Dawson gave statements to the Newark Police implicating Petitioner as the shooter. Hassan Carter was arrested some time in June.

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The Public Defender's office initially handled Petitioner's defense. Though their investigator was given a list of witnesses that Petitioner wanted called on his behalf, he allegedly did not talk to any of them. (Philson Aff. ¶¶ 4-5). John Vantuno, Esq., entered the case on August 18, 1990, and served as trial counsel. Petitioner claims that before the trial, he gave Mr. Vantuno the list of the witnesses he wanted called on his behalf. (Philson Aff. ¶¶ 2-4). This list included Carolyn Moore, Loretta Barber, Linda Barber, Quintana Holden, and Cawana Dawson. (Philson Aff. ¶ 3). Despite the fact that Petitioner asked him "several dozen times" to interview these witnesses, Mr. Vantuno did not interview any of these people, and none was called to testify as trial witness. (Philson Aff. ¶¶ 5-7).

Petitioner now submits statements and affidavits as to what each of these witnesses would have testified if called. (Cawana Dawson Aff., Ex. 9; Barber Aff., Ex. 12; Holden Statement to Newark Police Department, 2/1/90, Ex. 13; Essex County Prosecutor's Office Continuation Report by Roger Spain, Ex. 11).

Cawana Dawson signed an affidavit on April 15, 1992. She is the sister of Erica Dawson and the cousin of Petitioner's co-defendant, Hassan Carter. (C. Dawson Aff. ¶¶ 1, 6). Cawana Dawson states that her sister Erica and Aisha Jones came to her home two days after Ford's death. (Cawana Dawson Aff. ¶ 2). She claims in her affidavit that neither Erica Dawson nor Aisha Jones could identify the shooter, and that neither had ever before met Philson. (As said, Erica and Aisha were in the car at the time of the shooting.) (Dawson Aff. ¶¶ 4, 6, 10, 17). When Erica and

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Aisha asked Cawana about Philson because she used to live in the same neighborhood as he, Cawana told them that he was "very light-skin." (Dawson Aff. ¶¶ 6,10). Allegedly based on Cawana's description, Erica and Aisha reported Petitioner to the police on February 7, but they gave conflicting accounts of what he was wearing and what he did following the shooting. (Dawson Aff. ¶¶ 11, 13). Cawana also alleges in her affidavit a potential motive for Erica and Aisha to falsely implicate Philson. (Dawson Aff. ¶¶ 7-8):

> [M]y sister and Aiesha [sic] told me that they were at a club over the weekend and had seen one of the men that were present during the shooting. My sister was very frightened at the time and she stated that the person she seen went by the name Nap's. She then stated Nap's told her that Patrice Philson had shot Eric Ford after attempting to take a gold chain from him. Erica then stated that this guy Patrice had some girl's looking for her and Aiesha because they had Patrice Philson arrested. . . . Erica then stated Nap's pointed them out to his friends and told them to get Erica and Aiesha; [meaning to hurt or harm] Aiesha and Erica then asked me several questions about Patrice Philson.

(Dawson Aff. ¶¶ 7-8). Cawana avows that she never introduced her sister to Petitioner, as Erica Dawson told the police, and that Erica could describe Petitioner only based on the description Cawana gave her. (Dawson Aff. ¶ 17). Cawana in her affidavit states that she is prepared to testify that Aisha and Erica manufactured their testimony

about Philson based on the physical description she gave them. (Dawson Aff. ¶ 10).

Loretta Barber attests in an affidavit dated April 7, 1994, that contrary to Wise's testimony, he was not at her apartment on the night of the shooting. (Barber Aff. ¶¶ 5-8). She further claims that, though Petitioner came to her apartment that night, he was not allowed inside. (Barber Aff. ¶ 3). And she states that no conversation about Ford's death ever took place between Petitioner and Wise. (Barber Aff. ¶¶ 5-8). Loretta Barber finally offers that, though trial counsel never interviewed her as a potential witness, she would willingly have testified if called. (Barber Aff. ¶¶ 6-8). This testimony would have directly contradicted Damien Wise's testimony about the events following the shooting, including his statement at trial that Petitioner asked him if Ford was dead, and laughed when told he was. (Barber Aff. ¶¶ 5-8). Barber's affidavit submission is consistent with a contemporaneous report by Essex County Prosecutor's Office Investigator Roger Spain. When Spain and Newark Police Detective William Thomas interviewed Loretta Barber, Carolyn Moore, and their mother Linda Barber on February 28, 1990, they both stated that Petitioner had come to their home on the night of the shooting, but was not allowed inside. (Roger Spain Report). Wise was not mentioned in Investigator Spain's report. (Roger Spain Report).

Investigator Spain interviewed Quintana Holden on the night of the shooting, who stated that she looked out of her window after hearing the single gunshot. (Holden Statement at 1). After the gunshot, she saw "a boy" run away after Ford fell to the ground, but could not identify him. (Holden

Statement at 2). She then saw "two girls" steal Ford's jacket off his back, and overheard them discuss how they could get home since Ford had been shot. (Holden Statement at 2). The only "two girls" ever traced to the scene of the crime were the State's witnesses, Aisha Jones and Erica Dawson.

According to Petitioner, Mr. Vantuno did not interview or call Cawana Dawson, Loretta Barber, Carolyn Moore, Linda Barber, or Quintana Holden as trial witnesses. Petitioner also asked his appellate counsel Mark Carter, Esq., to secure statements from these witnesses, but Mr. Carter did not. (Philson Aff. ¶ 8). On his petition for post-conviction relief, Petitioner requested an evidentiary hearing. (Philson Pet. for Post-Conviction Relief, Ex. 5). The Superior Court heard oral argument, at which Petitioner, his Post-Conviction Relief and current attorney, Edward Jerejian, Esq., and the Assistant Prosecutor for Essex County appeared. *Id.* at 1. The Superior Court determined that Petitioner failed to advance any arguments that warranted an evidentiary hearing. *Id.* at 24. Based on the documentary record, including the affidavits, statements, and police reports presented to this court, but without requesting affidavit or live testimony from Petitioner's trial counsel Mr. Vantuno, his appellate counsel Mr. Carter, or his proposed witnesses, the Court determined that trial and appellate counsel had followed a sound strategy. *Id.*

After the Appellate Division affirmed the denial, and the New Jersey Supreme Court denied certification, Petitioner filed this habeas corpus petition. Again he alleges ineffective assistance of trial counsel[2], and that the Law Division erred

2. The Petitioner did not raise the claim of ineffective assistance of appellate counsel in his petition for habeas corpus relief.

in not holding an evidentiary hearing with regard to his petition for post-conviction relief. He now requests habeas corpus relief, or in the alternative, an evidentiary hearing by this court.

III. DISCUSSION

Petitioner contends that his trial attorney provided him with ineffective assistance of counsel throughout the trial proceedings. Specifically, he claims that Mr. Vantuno failed to interview, investigate, or call potentially exculpatory witnesses in his defense. This claim is based on defense counsel's failure to interview or call to the stand Cawana Dawson, Carolyn Moore, Loretta Barber, Linda Barber, or Quintana Holden as witnesses despite Petitioner's repeated requests both before and during his trial. Petitioner asserts that these witnesses were essential to his defense. Furthermore, he asserts that but for defense counsel's deficient performance, there is a reasonable probability that the outcome of his trial would have been different.

Petitioner moves for an evidentiary hearing as to his claims of ineffective assistance of counsel. Rule 8 of the Rules Governing § 2254 Cases in the United States District Courts states that the Court shall determine whether an evidentiary hearing is required or allowed.[3] This discretion

3. "If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require."

is restricted and controlled by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), specifically 28 U.S.C. § 2254(e)(2) (1994 ed. and Supp. III), and the United States Supreme Court decision of *Townsend v. Sain,* 372 U.S. 293, 83 S. Ct. 745, 9 L.Ed.2d 770 (1963). An evidentiary hearing is required under the following circumstances:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend, 372 U.S. at 311, 83 S. Ct. 745; *see also Hakeem v. Beyer,* 990 F.2d 750, 755 (3d Cir. 1993).

The *Townsend* decision emphasized that a federal district court possesses discretion to grant a hearing where it seems appropriate. *Id.* at 312-313. Though AEDPA restricted the availability of evidentiary hearings where "the applicant has failed to develop the factual basis of a claim in state court proceedings," see 28 U.S.C. § 2254(e)(2)[4], the remainder of

4. The Supreme Court recently limited the court's discretion to hold an evidentiary hearing in *Williams v. Taylor,* 120 S. Ct. 1479 (2000). That decision, holding that a "failure to develop the factual (Cont'd)

Townsend, and this court's discretion to call for an evidentiary hearing where appropriate, remains intact. *See Porter v. Gramley,* 112 F.3d 1308, 1314 n.6 (7th Cir. 1997), *cert. denied,* 522 U.S. 1093, 118 S. Ct. 886, 130 L.Ed.2d 873 (1998) ("Nothing in the statute . . . suggests that *Townsend*'s requirements are no longer in force as a separate limit. . . ."); *Lawrie v. Snyder,* 9 F.Supp.2d 428, 439 (D. Del. 1998) (five *Townsend* factors remain in effect, as does the court's discretion); *Marshall v. Hendricks,* 2000 WL 954937 (D. N.J. 2000) (where a petitioner has not failed to develop his claim in state courts, the petitioner may be entitled to an evidentiary hearing under the remaining *Townsend* factors, or at the court's discretion).

The court should use its discretionary power to hold an evidentiary hearing where, after it has considered all the facts of the case and examined the written record, it determines that the facts are in dispute or not fairly supported by the record as a whole. *See Hakeem v. Beyer,* 990 F. 2d at 755; *Reese v. Fulcomer,* 946 F.2d 247, 256 (3d Cir. 1991). If this court determines that Petitioner has established a prima facie case of ineffective assistance of counsel under *Strickland,* an evidentiary hearing would be proper in order to question defense counsel as to his trial strategy. *See Government of the Virgin Islands v. Weatherwax,* 20 F.3d 572 (3d Cir. 1994) (where the petitioner has made a prima facie claim of ineffective assistance of counsel, supported by affidavits and

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(Cont'd)
basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel," *see* 120 S. Ct. at 1488, affects only the fifth *Townsend* factor.

exhibits, and the record does not reveal whether trial counsel's decisions were a part of a deliberate strategy, the government "must then be afforded the opportunity to question . . . counsel . . . in order to show . . . that counsel proceeded on the basis of 'sound trial strategy.'").

A petitioner must satisfy the two-prong test articulated by the United States Supreme Court in *Strickland v. Washington* to succeed on an ineffective assistance of counsel claim. 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Berryman v. Morton,* 100 F.3d 1089, 1094 (3d Cir.1996). To meet the first prong of this test, a petitioner must demonstrate that his counsel's performance was deficient. *See id.* at 687. To establish this deficiency, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In making the objective evaluation as to counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The second prong of this test is to demonstrate that counsel's errors resulted in prejudice to the petitioner during the proceedings. *See id.* at 687. To satisfy this second prong, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The Law Division listed its findings on Philson's Petition for Post-Conviction Relief in an unpublished opinion dated July 31, 1995. (Philson Pet. for P.C.R.). Petitioner argued in

that application that his trial counsel Mr. Vantuno had been ineffective in failing to secure the statements of Cawana Dawson. (*Id.* at 14). The Law Division found that Cawana Dawson's testimony would not have helped Petitioner during the trial. See id. at 15). It challenged the timing and credibility of Cawana Dawson's signed affidavit:

> . . . . [T]his court must note that this affidavit was not prepared until approximately 1 1/2 years after petitioner's conviction. Whether this submission was the product of outside coercion is unknown, regardless it lends little credible support to his current claim. Cawana Dawson offers no explanation for her delay in offering this affidavit. Additionally, her assertion that she had not seen the defendant in five years [before the trial] casts doubt on her testimony that she provided the state's witnesses with a reliable description of Mr. Philson. Finally, the testimony of both Aisha Jones and Erica Dawson was factually consistent with the other eyewitnesses to the shooting who testified at trial. This fact discredits the affidavit of Cawana Dawson which states that neither Jones nor Erica Dawson saw the shooting.

(*See Id.*). The Law Division also suggested that the only purpose of Cawana Dawson's testimony would be to impeach the testimony of Erica Dawson and Aisha Jones, which defense counsel attempted to do both on cross-examination and summation. (*See id.* at 14).

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Petitioner also argued to the Law Division that his defense counsel's failure to investigate and call Loretta Barber, Carolyn Moore, Linda Barber, and Quintana Holden as witnesses with potentially exculpatory evidence constitute ineffective assistance of counsel. (*See id.* at 15). The court responded that Petitioner's trial counsel "could have reasonably chosen not to explore the specific avenues of examination proposed by petitioner for fear that further inquiry might have exposed information detrimental to the defense." *Id.* at 8. The court wrote: "[C]ounsel could have reasonably concluded that these witnesses would not have made good witnesses for the defense." (*Id.* at 16). It reasoned that though the testimony of Moore and Barber might have contradicted the testimony of Damien Wise, it would also corroborate that Petitioner was near the scene of the murder at the time. (*See id.*). Further, though the testimony of Holden may have impeached the credibility of Erica Dawson and Aisha Jones, the court found dispositive that her statements may have also corroborated that these two witnesses were present at the scene of the crime. (*See id.* The Law Division concluded: "[A]pparently, defense counsel made a conscious decision not to call the witnesses for fear that their testimony might prejudice the defense." (Id. at 17). The court further held that Petitioner did not demonstrate sufficient prejudice according to the second prong of the *Strickland* test. (*See id.* at 18). Overall, the court held that Petitioner did not meet his burden of proof in establishing either trial counsel's deficiency, or that he suffered prejudice as a result of trial counsel's performance. (*See id.* at 22-24).

Now, Petitioner alleges that trial counsel's performance failed the first prong of the *Strickland* test. According to

Appendix F

Petitioner, despite repeated requests, trial counsel never contacted nor interviewed a single witness suggested by Petitioner to develop his defense. Unfortunately, this court is not presented with any evidence that demonstrates why counsel acted as he did. Absent such affidavit or live testimony, before either the Law Division on postconviction relief or here, this court is unwilling to speculate as to trial counsel's strategy or motives. Though the Law Division credited counsel with making sound decisions, this court can not concur at this time.

Petitioner alleges that his trial counsel failed to interview or investigate proffered witnesses, without the benefit of a sound trial strategy. If true, such contentions establish a prima facie claim of ineffective assistance of counsel under the first prong of the *Strickland* standard. *See Weatherwax,* 20 F.3d at 580. Strickland itself indicates that:

> [c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigative decisions are reasonable depends critically on such information. . . . In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's other litigation decisions.

Strickland, 466 U.S. at 689-691. Where the facts are in dispute, and there is no evidence to fairly support a

determination either way, *Townsend* directs that "the holding of such a hearing is in the discretion of the district judge. . . . In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." 372 U.S. at 318. This court now exercises such discretion, unless any interested party submits evidence to this court which was presented to the Law Division on the petition for post-conviction relief that concerns trial counsel's strategy and state of mind. Failing that, trial counsel John Vantuno, Petitioner's present counsel Edward Jerejian, and Petitioner are ordered to appear on September 19, 2000 at 9:30a.m. for an evidentiary hearing to develop the record solely as to trial counsel's strategy and rationale for his actions.

Consequently, this court need not now address the contested second prong of *Strickland,* concerning prejudice to the Petitioner based on trial counsel's alleged errors. *See, e.g.,* Resp't Answer and Br. at 7 (claiming that Petitioner failed to establish that "but for counsel's unprofessional errors, the result of the proceeding would have been different."); Petitioner's Br. at 12 (arguing that the testimony of Cawana Dawson "went to the very heart of the case. . . . Clearly this could have changed the jury's verdict."); Petitioner's Br. at 14 (asserting that the using the testimony of Carolyn Moore, Loretta Barber, and Linda Barber to challenge Damien Wise's testimony "certainly would have changed the trial's results."); Petitioner's Br. at 15 (contending that the failure to call Quintana Holden to impeach Aisha Jones and Erica Dawson was "prejudicial to the defendant.").

Appendix F

IV. CONCLUSION

Thorough review of Petitioner's contentions and the decision of the Law Division on the petition for post-conviction relief persuades this court that an evidentiary hearing is appropriate to assess the effectiveness of Petitioner's trial counsel John Vantuno. Petitioner, his present attorney Edward Jerejian, and trial counsel John Vantuno are ordered to appear on September 19, 2000 at 9:30a.m. for an evidentiary hearing.

SO ORDERED:

s/ William H. Walls
William H. Walls, U.S.D.J.

24 August 2000
Dated

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED AUGUST 24, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 98-2249 (WHW)

PATRICE PHILSON a/k/a JUSTICE ALLAH,

Petitioner,

v.

JAMES F. BARBO, Administrator, New Jersey State Prison and PETER VERNIERO, Attorney General of New Jersey,

Respondents.

ORDER

WALLS, District Judge

Patrice Philson petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and § 2243. For the reasons stated in the accompanying opinion:

It is on this 24th day of August 2000, ORDERED that Patrice Philson, Edward Jerejian, and trial counsel John Vantuno appear on September 19, 2000 at 9:30a.m. for an evidentiary hearing to develop the record solely as to trial counsel's strategy and rationale for his actions.

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SO ORDERED:

s/ William H. Walls
William H. Walls, U.S.D.J.

24 August 2000
Dated

APPENDIX H — ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION FILED MAY 21, 1997

SUPREME COURT OF NEW JERSEY
C-1074 September Term 1996
43,774

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PATRICE PHILSON,

Defendant-Petitioner.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-431-95 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 20th day of May, 1997.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

APPENDIX I — PER CURIAM OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED JANUARY 21, 1997

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-431-95T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PATRICE PHILSON,

Defendant-Appellant.

Submitted December 16, 1996 – Decided JAN 21 1997

Before Judges Brochin and Eichen

On appeal from the Superior Court of New Jersey, Law Division, Essex County

Ashley & Charles and Feinberg and Feinberg, attorneys for appellant (Thomas R. Ashley and Paul H. Feinberg, of counsel; Mr. Feinberg, on the brief).

Peter Verniero, Attorney General of New Jersey, attorney for respondent (Kathleen M. Gusler, Deputy Attorney General, of counsel and on the brief).

Appellant filed a *pro se* supplemental brief.

Appendix I

PER CURIAM

On October 16, 1990, a jury found defendant Patrice Philson guilty of first degree purposeful or knowing murder (*N.J.S.A.* 2C:11-3a(1) and -3a(2)); unlawful possession of a weapon (*N.J.S.A.* 2C:39-5b); and possession of a weapon for an unlawful purpose (*N.J.S.A.* 2C:39-4a). The weapons offense convictions were merged with the murder conviction, and defendant was sentenced to life imprisonment with thirty years' parole ineligibility.

Defendant's conviction was affirmed by this court in a *per curiam* opinion issued December 29, 1992. We considered the following arguments and rejected all of them as clearly without merit:

> The trial court failed to instruct the jury on the charge of manslaughter.
>
> As a matter of law, there was insufficient evidence for conviction.
>
> Defendant was denied effective assistance of counsel in violation of his rights under the United States and New Jersey Constitutions.
>
> The trial court erred in imposing a life sentence with thirty years' parole ineligibility.
>
> The trial judge improperly restricted the cross-examination of the State's main witnesses.

Appendix I

Defendant's petition for certification of our decision to the New Jersey Supreme Court was denied.

Defendant filed a petition for post-conviction relief dated May 5, 1993. His petition was denied by the trial court on July 31, 1995 in a comprehensive letter opinion. The matter presently before us for decision is defendant's appeal from the order of the trial court denying post-conviction relief.

In the brief filed on defendant's behalf by counsel, he argues the following points:

> Point I. Defendant was entitled to post-conviction relief and a new trial should have been ordered.
>
> Point II. The court erred by not ordering an evidentiary hearing.

In a *pro se* supplemental brief, defendant argues the following points:

> Point I. The court below should have granted defendant an evidentiary hearing on his petition for post-conviction relief.
>
> Point II. Defendant should not have been barred from raising any issue set forth within his post-conviction relief petition.
>
> Point III. Defendant's conviction was against the weight of the evidence in violation of his right of due process guaranteed to him by the 5th and 14th Amendments to the United States Constitution.

> Point IV. Defendant was denied effective assistance of counsel in violation of U.S. Constitution, Amendment VI and Art. 1 Par. 10 of the New Jersey Constitution.
>
> Point V. Defendant was deprived of his right to effective assistance of counsel on appeal guaranteed by the Sixth Amendment and Due Process Clause of the Fourteenth Amendment. Wherefore, in the interest of justice, [defendant] demands an evidentiary hearing and/or a new trial.

We have carefully considered the portions of the record presented to us and the parties' arguments as submitted to us in their briefs. We reject all of defendant's arguments except Point V of his *pro se* brief substantially for the reasons stated in the post-conviction relief judge's letter opinion dated July 31, 1995. We reject the argument asserted in Point V of the *pro se* brief on the ground that it is clearly without merit. R. 2:11-3(e)(1)(A) and (E).

The order appealed from is therefore affirmed.

APPENDIX J — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY FILED AUGUST 4, 1995

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY
INDICTMENT NO. 1155-3-90

STATE OF NEW JERSEY

VS.

PATRICE PHILSON

ORDER
ON PETITION FOR
POST-CONVICTION RELIEF

The matter having come before the Court on application of the defendant-petitioner, Patrice Philson for Post-Conviction Relief (Edward Jerejian, Esq., appearing) and the State having opposed the application (Daniel Keitel, Esq., appearing) and the Court having read and considered the submissions of the parties and having heard arguments of counsel and having heard from defendant and good cause therefore appearing:

It is on this 31st day of July, 1995;

ORDERED that the Petition for Post-Conviction Relief be and the same is hereby in all respects denied for the reasons set forth in the Court's decision of same date.

s/ Donald J. Volkert, Jr.
Donald J. Volkert, Jr.
J.S.C.

APPENDIX K — ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION FILED FEBRUARY 25, 1993

SUPREME COURT OF NEW JERSEY
C-605 September Term 1992
36,295

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PATRICE PHILSON,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5999-90 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 23rd day of February, 1993.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

APPENDIX L — PER CURIAM OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED DECEMBER 29, 1992

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5999-90T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PATRICE PHILSON,

Defendant-Appellant.

Submitted December 8, 1992 – Decided Dec 29 1992

Before Judges Muir, Jr., and Kestin.

On appeal from the Superior Court, Law Division, Essex County.

Zulima V. Farber, Public Defender, attorney for appellant (Mark S. Carter, Designated Counsel, of counsel and on the letter brief).

Robert J. Del Tufo, Attorney General of New Jersey, attorney for respondent (Kathleen M. Gusler, Deputy Attorney General, of counsel and on the letter brief).

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Patrice Philson, appellant, filed a *pro se* supplemental letter brief.

PER CURIAM A jury found defendant guilty of knowing and purposeful murder (count three, *N.J.S.A.* 2C:11-3a(1), (2)), unlawful possession of a handgun (count four, *N.J.S.A.* 2C:39-5b), and possession of a handgun for an unlawful purpose (count five, *N.J.S.A.* 2C:39-4a). The trial court merged counts four and five into count three and sentenced defendant to life imprisonment with thirty years' parole ineligibility.

Defendant appeals. In the brief prepared by counsel, defendant contends:

POINT I

DEFENDANT'S CONVICTION MUST BE REVERSED AND THE SENTENCE VACATED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE CHARGE OF MANSLAUGHTER. (POINT NOT RAISED [IN THE TRIAL COURT].)

POINT II

DEFENDANT'S CONVICTION SHOULD BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO CONVICT AS A MATTER OF LAW. (POINT NOT RAISED [IN THE TRIAL COURT].)

PETITION FOR RE-HEARING

Supreme Court, U.S.
FILED
JUN - 5 2004
OFFICE OF THE CLERK

No. 03-1387

IN THE

Supreme Court of the United States

PATRICE PHILSON, a/k/a JUSTICE ALLAH,

Petitioner,

v.

LYDELL B. SHERRER, Administrator, Northern States Prison; and THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

PATRICE PHILSON
a/k/a JUSTICE R. ĀLLAH
New Jersey State Prison
P.O. Box 861-#230948/640344B
Trenton, NJ 08625

QUESTIONS PRESENTED

Should the decision of the United States Supreme Court to deny petitioner a Writ Of Certiorari be re-examined in light of an error of fact in the lower courts decision?

Was the misrepresentation of fact contrary to The United States Supreme Court's findings in the matter of *Anderson v. City Of Bessemer City, N.C.* 105 S.Ct. 1504 (1985)?

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Bell v. Cone, 122 S. Ct. 1831 (2002) 6

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Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2025 (1984) 3

United States v. Gray, 878 F.2d (3d Cir. 1989) 5, 6

Rule:

United States Supreme Court Rule 44 3

PETITION FOR REHEARING

Petitioner respectfully asks that this Court grant a petition for rehearing based on the fact that the lower court's decision was reached on asserted facts that were never part of the record. The petitioner further states that this petition is presented in good faith and not to delay or waste the Court's most valuable time.

OPINIONS BELOW

The Opinions of The United States District Court as well as the Third Circuit Court of Appeals are contained in Petitioner's Original Petition for Writ of Certiorari before this Court. The Petitioner will rely on those opinions to support this petition. (At Pet App. 26a, 12a, la respectfully).

STATEMENT OF THE CASE

On February 1, 1990 at approximately 2 a.m., Eric Ford was shot and killed in the area of Sixth Avenue and Thirteenth Streets in Newark, New Jersey. The State's theory was that, the petitioner was in the process of robbing Mr. Ford when Mr. Ford was fatally shot. To support it's claims, the state relied on the testimony of Erica Dawson, Aisha Jones, Glenn Copeland, and Damien "Naps" Wise. Erica Dawson and Aisha Jones had accompanied Ford to that intersection and allegedly witnessed the shooting. Although there were serious discrepancies in regards to what petitioner was alleged to have done and wore, both witnesses identified the petitioner as the gunman.

The state's most powerful testimony came from it's chief witness, Damien "Naps" Wise. Wise testified that shortly

after the shooting, he observed the petitioner hiding inside a second floor bedroom apartment in the Barber's residence. According to Wise, the petitioner asked him if the victim was dead yet! Wise testified that when he told the petitioner the victim was laying on the ground gargling on his own blood, the petitioner started laughing. Wise's testimony established that the petitioner was inside the Barber's residence displaying an obvious knowledge of the shooting. However, six months prior to trial, two of the state's investigators interviewed the Barber family about the testimony given by Wise. Both investigators submitted reports that clearly indicate that petitioner and Wise were **NEVER** inside the Barber's residence on the night in question.

Carolyn Moore went on to add that petitioner had knocked on the door that night, but due to the hour of day [2:30 a.m.] she refused to let him in. One of petitioner's key arguments during his State and Federal appeal was the issue of ineffective assistance of trial counsel. The State's Appellate and Supreme Courts upheld petitioners conviction. On petitioner's petition for writ of habeas corpus relief, the Honorable William H. Walls, U.S.D.J. granted petitioner an evidentiary hearing in regards to petitioner's claims that counsel failed to call potentially exculpatory witnesses.

The district court ordered that an evidentiary hearing was to be conducted solely as to trial counsel's strategy and the rational for his decision. During an evidentiary hearing trial counsel was asked if the petitioner had informed him that he wanted Cawana Dawson and the entire Barber family called as defense witnesses. Counsel claimed that he never heard of Cawana Dawson, and insisted that petitioner did inform him about the Barber family, but insisted that petitioner

wanted the Barber family called as alibi defense witnesses only. Counsel was stern in his claim of alibi as a defense strategy. The claim by trial counsel of an alibi defense is a key factor in petitioner's appeal. An alibi defense claim by trial counsel is significant mainly because this claim (alibi defense) allows counsel to justify his faulty actions by way of the claiming his decision under the "reasonable decision" aspect of *Strickland,* 466 U.S. 668, 104 S. Ct. 2025 [at 13]

An examination of counsel's claims of an alibi defense is critical to this petitioner. Was counsel's testimony that petitioner wanted the Barber family called as alibi defense witnesses supported by evidence in the trial record?

REASON FOR GRANTING REHEARING

Pursuant to Rule 44 of the United States Supreme Court, petitioner would respectfully ask that this court reconsider its June 7, 2004 order denying a Petition for a Writ of Certiorari. In petitioner's original Petition for a Writ of Certiorari, the petitioner inadvertently omitted a critical error in fact that turned out to be the basis for the District Court's denial of the habeas corpus petition. In upholding the lower court's denial of the petitioner's claims, the Third Circuit Court of Appeals found that:

> Philson also criticizes the decision not to call Barber and Moore to the stand. In the course of discovery, Vantuno (Trial Counsel) had read the statements they had given to the police. Both statements allege that Philson and Wise came to their apartment in the early morning hours but had been refused entry because of the lateness of the

> hour. Philson contends that their testimony would have undermined Wise's damaging allegations of the petitioner's inculpatory statements made in the apartment.
>
> As a matter of trial strategy, Vantuno decided not to call these women as witnesses because their testimony would have supplied evidence of Philson's flight. Giving appropriate deference to counsel's judgment in light of all the circumstances here, we cannot say he was ineffective in his strategic decision. Moreover, as the district judge pointed out, the testimony of these two women "would not have knocked out [Aisha] Jones and Erica Dawson's eyewitness testimony.

The petitioner would first like to inform this Court that the District Court's findings above were not supported by the record. The Barber family **NEVER** claimed that Philson and Wise were inside their apartment together. In fact, the Barber family testimony was the complete opposite of the court's findings. The Barber family statement was that Philson and Wise were never inside their apartment that night. The testimony by Wise that petitioner started laughing when told the victim was laying on the ground gargling on his own blood, should never have been allowed to taint the minds of the jury. Trial counsel gave testimony that petitioner wanted the Barber family called as alibi defense witnesses. The fact that the record fully supported petitioner's claims that counsel's testimony was not based on evidence in the record, should have warranted the District Court to grant a new hearing to allow petitioner to cross examine counsel as to his actions. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 at 14.

A new evidentiary hearing with counsel being called to explain his trial strategy in light of his unsupported statements during the evidentiary hearing, is the best way of allowing petitioner an opportunity to expose counsel's motivation in testifying. Exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Davis v. Alaska,* 415 U.S. 311, 94 S. Ct. 1105 (1974).

The Third Circuit found that the testimony of the Barber family would not have effected the testimony of Erica Dawson and Aisha Jones. A new evidentiary hearing in respect to counsel's claims of not knowing about Cawana Dawson before trial will demonstrate that counsel in fact knew about Cawana Dawson before trial, and only claimed to have no knowledge of Cawana Dawson to justify his faulty action. Trial counsel testified during the October 5, 2000 evidentiary hearing that he never conducted an investigation in this case, never spoke to any witnesses, and never even contemplated hiring an investigator. The District Court denied petitioner's motion seeking a new evidentiary hearing to expose counsel's motivation in testifying. Counsel's claims in light of the record and the denial of petitioners request for a new evidentiary hearing before the District Court were never addressed by the Third Circuit Court of Appeals. Counsel's admission that he conducted no pre-trial investigation and spoke to no witnesses, hardly can be deemed effective assistance.

The decision of the Third Circuit Court of Appeals to uphold the District Court's findings, is contrary to long established Third Circuit law, *United States v. Gray,* 878 F.2d (3d Cir. 1989) holding that: Counsel's performance in conducting a reasonable pretrial investigation or determining

that such an investigation was not necessary was so "severely deficient" as to fail even the differential test of attorney competence laid out in *Strickland*. Citing that, counsel's testimony that he did not make any attempt to locate witnesses or to hire an investigator, "abdicated his duty to conduct a pretrial investigation and left it entirely up to *Gray* himself to conduct the pretrial investigation." The United States Supreme Court has consistently found that a conviction must be based on evidence supported by the record. *Miller v. Fenton*, 474 U.S. 104, 112, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985). The petitioner's conviction was based on an "unreasonable application" of clearly established Federal law. *Bell v. Cone*, 122 S. Ct. 1831.

The lower court's findings were clearly erroneous because the findings were contrary to the facts of the case. *Anderson v. City of Bessermer City, N.C.*, 470 U.S. 564, 105 S. Ct. 1504 (1985). Federal habeas corpus review of whether a state decision is based on an unreasonable determination of facts is limited to the record available to the state trial court and encompasses two questions:

1. Whether factual determinations of the state court were "unreasonable" in light of state record, and

2. Whether the state court's decision was "based" on that unreasonable determination. *See Breighner v. Chesney*, 301 F. Supp. 2d 354 (M.D. Pa. 2004) [quoting *Cockrell*, 537 U.S. at 340-341, 123 S. Ct. 1029]

The question which Supreme Court must answer is not whether the interpretation of the facts by the Court of Appeals

was clearly erroneous, but whether the District Court's findings were clearly erroneous. *Anderson v. City of Besseemer City, N.C.*, 105 S. Ct. 1504 (1985)

The lower court's decision was based on evidence that was not supported by the record. The petitioner should be granted a rehearing to expose counsel's motivation in testifying. Trial counsel's testimony pertained directly to the petitioner's guilt or innocence. Petitioner asks that this petition for rehearing be granted.

CONCLUSION

The Petition for Rehearing should be granted.

Respectfully submitted,

PATRICE PHILSON
a/k/a JUSTICE R. ALLAH
New Jersey State Prison
P.O. Box 861-#230948/640344B
Trenton, NJ 08625

CERTIFICATION

Pursuant to Rule 44.(2) of the United States Supreme Court I hereby certify that the enclosed Rule 44 rehearing petition is prepared in compliance to Rule 44.(2) The petition is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. The petition for rehearing is presented in good faith and not for delay.

PATRICE PHILSON a/k/a
Justice R. Allah
Pro se- Petitioner
Appellant
New Jersey State Prison
P.O. Box 861
Trenton, New Jersey, 08625

Date: June 17th 2004

CC: Attorney General Office
File

Appendix L

POINT III

DEFENDANT'S CONVICTION AND SENTENCE MUST BE REVERSED BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE STATE AND FEDERAL CONSTITUTIONS.

POINT IV

DEFENDANT'S SENTENCE SHOULD BE MODIFIED BECAUSE THE TRIAL COURT WAS IN ERROR IN IMPOSING A LIFE SENTENCE WITH A 30 YEAR PAROLE INELIGIBILITY.

In a *pro se* supplemental brief, defendant argues:

POINT I

THE TRIAL JUDGE IMPROPERLY RESTRICTED THE CROSS-EXAMINATION OF THE STATE'S MAIN WITNESSES.

POINT II

DEFENDANT'S CONVICTION AND SENTENCE SHOULD BE REVERSED BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Appendix L

POINT III

THE DEFENDANT'S CONVICTION AND SENTENCE SHOULD BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO CONVICT AS A MATTER OF LAW (POINT NOT RAISED [IN THE TRIAL COURT]).

After review of the record, the briefs, and the applicable law, we conclude all contentions and arguments' are clearly without merit. R. 2:11-3(e)(2). Accordingly, we affirm.

APPENDIX M — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 24, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-3658

PATRICE PHILSON, a/k/a JUSTICE ALLAH

Appellant

v.

JAMES BARBO, Administrator, Northern States Prison; and THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

BEFORE: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, WEIS,* and GARTH,* *CIRCUIT JUDGES*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision

---

* As to Panel Rehearing Only.

having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing is DENIED.

BY THE COURT:

Joseph F. Weis, Jr.
United States Circuit Judge

DATED: November 24, 2003

APPENDIX N — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING MOTION TO RECONSIDER DATED FEBRUARY 13, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

January 29, 2004

No. 01-3658

Patrice Philson,

Appellant

v.

James F. Barbo, et al.

Present: RENDELL, WEIS & GARTH, *Circuit Judges*

Motion by Appellant Pursuant to I.O.P 10.8 (3)
Construed as Motion to Reconsider Denial of
Petition for Rehearing.

s/ Charlene Crisden
Charlene Crisden
267-299-4923

Order dated 1/26/04 and memo is attached.

Appendix N

ORDER

The Motion is denied.

By the Court,

s/ Weis
Circuit Judge

Date: Februany 13, 2004